

17  
No. 89-152-CFX  
Status: GRANTED

Title: Vera M. English, Petitioner  
v.  
General Electric Company

Docketed:  
July 27, 1989

Court: United States Court of Appeals  
for the Fourth Circuit

Counsel for petitioner: Payne, M. Travis

Counsel for respondent: Phillips, Carter G.

Entry	Date	Note	Proceedings and Orders
1	Jul 27 1989	G	Petition for writ of certiorari filed.
3	Aug 14 1989		Order extending time to file response to petition until September 15, 1989.
4	Sep 12 1989		Brief of respondent General Electric Company in opposition filed.
5	Sep 13 1989		DISTRIBUTED. October 6, 1989
6	Oct 3 1989	X	Supplemental brief of petitioner Vera M. English filed.
7	Oct 10 1989	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Jan 2 1990	X	Brief amicus curiae of United States filed.
9	Jan 3 1990		REDISTRIBUTED. January 19, 1990
10	Jan 11 1990	X	Supplemental brief of respondent General Electric Company filed.
11	Jan 22 1990		Petition GRANTED. *****
12	Feb 23 1990		SET FOR ARGUMENT WEDNESDAY, APRIL 25, 1990. (1ST CASE)
13	Mar 5 1990		Brief amici curiae of Attorney General of North Carolina, et al. filed.
14	Mar 7 1990		Record filed.
		*	Certified copy of original record and proceedings, 3 volumes, received.
15	Mar 7 1990		Brief amicus curiae of Plaintiff Employment Lawyers Assn. filed.
16	Mar 8 1990		Brief amicus curiae of National Whistleblower Center filed.
17	Mar 8 1990		Brief of petitioner Vera M. English filed.
18	Mar 8 1990		Joint appendix filed.
19	Mar 8 1990		Brief amicus curiae of Government Accountability Project filed.
20	Mar 8 1990		Brief amicus curiae of National Conference of State Legislatures, et al. filed.
21	Mar 8 1990		Brief amicus curiae of United States filed.
22	Mar 15 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	Mar 26 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Mar 30 1990		CIRCULATED.
25	Apr 12 1990		Brief amicus curiae of Nuclear Management and Resources Council, Inc. filed.
26	Apr 12 1990	X	Brief of respondent General Electric Co. filed.
27	Apr 17 1990		Lodging Form NRC-3 received and distributed.

2 p/b

No. 89-152-CFX

Entry	Date	Note	Proceedings and Orders
-------	------	------	------------------------

---

28	Apr 18 1990	X	Reply brief of petitioner Vera M. English filed.
29	Apr 25 1990		ARGUED.



89-152

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

JUL 27 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

\_\_\_\_\_  
VERA M. ENGLISH,  
*Petitioner,*

v.

\_\_\_\_\_  
GENERAL ELECTRIC COMPANY,  
*Respondent.*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

*Of Counsel:*

M. TRAVIS PAYNE  
EDELSTEIN, PAYNE & NELSON  
P.O. Box 12607  
Raleigh, N.C. 27605  
(919) 828-1456

ARTHUR M. SCHILLER  
Attorney at Law  
21 DuPont Circle, N.W.  
Suite 401  
Washington, D.C. 20036  
(202) 857-5658  
*Counsel for Petitioner*

#### **QUESTION PRESENTED FOR REVIEW**

Should an employee's well-recognized and well-founded state tort action that does not in any way address issues of nuclear regulation or safety, be preempted by Section 210 of the Energy Reorganization Act, 42 USC Section 5851, the so-called nuclear "whistleblowers" statute?

#### **LIST OF PARTIES**

The parties to the proceedings below are the petitioner Vera English and the respondent General Electric Company.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW .....	i
LIST OF PARTIES.....	i
TABLE OF AUTHORITIES .....	iv
REPORT OF OPINIONS .....	1
JURISDICTION .....	1
STATUTES INVOLVED .....	1
STATEMENT OF THE CASE .....	5
REASONS WHY THE WRIT SHOULD BE GRANTED .....	10
A. The Decision Below Conflicts With The Respect For The Rights Of States As Reflected In <i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977), <i>Lingle v. Norge Division of Magic Chef</i> , 486 U.S. — (1988), and <i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) .....	10
B. The Decision Below Conflicts With The Holding Of This Court In <i>California Coastal Commission v. Granite Rock Co.</i> , 480 U.S. 572 (1987) .....	14
C. The Decision Below Conflicts With The Holding Of This Court In <i>Decanas v. Bica</i> , 424 U.S. 351 (1976) .....	17
D. The Decision Below Conflicts With This Court's Decisions In <i>Pacific Gas and Electric Co. v. Energy Resources Commission</i> , 461 U.S. 190 (1983), and <i>Silkwood v. Kerr McGee Corp.</i> , 464 U.S. 238 (1984) .....	18
E. There Is Conflict Among The Courts Concerning The Preemption Of State Claims By Federal Employment Statutes .....	20
CONCLUSION .....	22

## TABLE OF AUTHORITIES

SUPREME COURT CASES		Page
<i>Automobile Workers v. Russell</i> , 356 U.S. 634 (1958) .....		13
<i>Belknap v. Hale</i> , 463 U.S. 491 (1983) .....		13
<i>California Coastal Commission v. Granite Rock Co.</i> , 480 U.S. 572 (1987) .....	14, 15, 16	
<i>Decanas v. Bica</i> , 424 U.S. 351 (1976) .....	17, 18	
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977) .....	10, 11, 12	
<i>Fort Halifax Packing Company v. Coyne</i> , 482 U.S. — (1987), 96 L.Ed.2d 1 .....	13	
<i>Lingle v. Norge Division of Magic Chef</i> , 486 U.S. — (1988), 100 L.Ed.2d 410 .....	10, 13, 15	
<i>Linn v. Plant Guard Workers</i> , 383 U.S. 53 (1966) ..	13	
<i>Pacific Gas and Electric Co. v. Energy Resources Commission</i> , 461 U.S. 190 (1981) .....	18, 19, 20	
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 276 (1959) .....	10, 13	
<i>Silkwood v. Kerr McGee Corp.</i> , 464 U.S. 238 (1984) .....	18, 19, 20	
OTHER FEDERAL CASES		
<i>Baldracchi v. Pratt &amp; Whitney</i> , 814 F.2d 102 (2nd Cir. 1987) .....	22	
<i>English v. Whitfield</i> , 858 F.2d 957 (4th Cir. 1988) ..	8	
<i>Keehr v. Consolidated Freightways</i> , 825 F.2d 133 (7th Cir. 1987) .....	22	
<i>Local No. 57 v. Bechtel Power Corp.</i> , 834 F.2d 884 (10th Cir. 1987) .....	22	
<i>Merchant v. American Steamship Co.</i> , 860 F.2d 204 (6th Cir. 1988) .....	22	
<i>Miller v. AT&amp;T Network Systems</i> , 850 F.2d 543 (9th Cir. 1988) .....	22	
<i>Norris v. Lumberman's Mutual</i> , 687 F.Supp. 699 (Mass. 1988) .....	21	
<i>Paige v. Henry J. Kaiser Co.</i> , 826 F.2d 857 (9th Cir. 1987) .....	22	
<i>Smolarek v. Chrysler Corp.</i> , 858 F.2d 1165 (6th Cir. 1988) .....	22	

## TABLE OF AUTHORITIES—Continued

	Page
<i>Snow v. Bechtel Construction</i> , 647 F.Supp. 1514 (C.D. Cal. 1986) .....	21
<i>Stokes v. Bechtel North American Power Corp.</i> , 614 F.Supp. 732 (N.C. Cal. 1985) .....	21
OTHER CASES	
<i>Chrisman v. Phillips Industries, Inc.</i> , 242 Kan. 772, 751 P.2d 140 (1988) .....	21
<i>Crews v. Provident Finance Co.</i> , 271 N.C. 684, 157 S.E.2d 381 (1967) .....	10
<i>Dixon v. Stuart</i> , 85 N.C. App. 338, 354 S.E.2d 757 (1987) .....	11, 18
<i>Kirby v. Jules Chain Stores Corp.</i> , 210 N.C. 808, 188 S.E. 625 (1936) .....	10
<i>Stanback v. Stanback</i> , 297 N.C. 181, 254 S.E.2d 611 (1979) .....	10
<i>Wheeler v. Caterpillar Tractor Co.</i> , 108 Ill.2d 502, 485 N.E.2d 372 (1985), cert. den., 475 U.S. 1122 (1986) .....	21
<i>Woodruff v. Miller</i> , 64 N.C. App. 364, 307 S.E.2d 176 (1983) .....	11, 20
STATUTES	
Section 210 of the Energy Reorganization Act, 42 USC Section 5851 .....	passim
N.C.Gen.Stat. Section 95-25.20 .....	16
N.C.Gen.Stat. Section 95-130 (8) .....	16
N.C.Gen.Stat. Section 96-15.1 & 15.2 .....	16
N.C.Gen.Stat. Section 97-6.1 .....	15
N.C.Gen.Stat. Chapter 168A .....	16
N.C.Gen.Stat. Section 143-422.2 .....	15
RULES	
Federal Rules of Civil Procedure	
12(b) (1) .....	9
12(b) (6) .....	9, 14
OTHER AUTHORITIES	
Kohn, <i>Protecting Environmental and Nuclear Whistleblowers</i> (1985) .....	20

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

\_\_\_\_\_  
No. \_\_\_\_\_  
\_\_\_\_\_

VERA M. ENGLISH,  
v. *Petitioner,*

GENERAL ELECTRIC COMPANY,  
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**REPORT OF OPINIONS**

The Order of the District Court is reported at 683 F.Supp. 1006 (E.D.N.C. 1988). (Appendix, p. 6a) The Opinion of the Court of Appeals is reported at 871 F.2d 22 (4th Cir. 1989). (Appendix, p. 1a)

**JURISDICTION**

The Opinion of the Court of Appeals was decided and entered on April 3, 1989. A Petition for Rehearing and Suggestion for Rehearing *en banc* was denied and entered on April 28, 1989. (Appendix, p. 4a) Jurisdiction of this Honorable Court is invoked pursuant to 28 USC Section 1254(1).

**STATUTE INVOLVED**

Section 210 of the Energy Reorganization Act,  
42 U.S.C. § 5851. Employee protection

(a) Discrimination against employee

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or appli-



cant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) —

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2) (A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint,

the Secretary shall complete such investigation and shall notify in writing the complaint (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) Review

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section



may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Jurisdiction

Whenever a person has failed to comply with an order issued under subsection (b) (2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(e) Commencement of action

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Enforcement

Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28.

(g) Deliberate violations

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

STATEMENT OF THE CASE

Vera English was born in the state of Maine in 1925. She grew up in that state, received training in the medical field, was certified as a licensed practical nurse, and worked there in the medical field for a number of years. She also received training in clinical medical laboratory technique and was certified as a medical technologist.

In 1960 Ms. English moved with her husband to Wilmington, North Carolina. From 1960 to 1972 she worked in a variety of laboratory positions in hospital and medical research facilities, as well as in the area of quality control for an aerospace firm making components for the Apollo project. During this period she received additional training and education in the field of chemistry and laboratory procedures. In November, 1972, she was hired by respondent General Electric to work in the Chemet Lab at its Wilmington Nuclear Fuels Manufacturing facility, performing chemical analyses to assure the quality of the materials in nuclear fuel rods.

Ms. English took her duties at General Electric very seriously. The radioactive materials that she was working with not only presented a substantial safety hazard to her and her co-workers, but also presented substantial potential hazards to the general public once it was incor-

porated into nuclear fuel rods. Being ever conscious and concerned about these hazards, Ms. English took seriously her legal obligations to report potential safety and quality problems to management and government authorities.

Prior to 1984 Ms. English had reported a number of safety and quality concerns both to respondent's management personnel as well as to government officials. Those complaints had been largely ignored and Ms. English had been disparaged and derided as paranoid for making such complaints. (Complaint paragraph 9) In February, 1984, Ms. English again reported safety hazards and illegal practices to representatives of the Nuclear Regulatory Commission as well as to management personnel. (Complaint paragraphs 10 & 12) Following these complaints Ms. English continued to observe lax safety procedures and substantial radiation contamination which other workers had repeatedly left about her workplace. (Complaint paragraphs 13, 14 & 15) As her complaints about worker contamination had been largely ignored by management, on March 10, 1984, Ms. English decided that the only way she could convince management personnel of the legitimacy of her concerns was to not clean up some of the contamination that other employees had left at her work station so that she could show it to her supervisor. As her supervisor would not be on duty with her until March 12, 1984, she marked off a portion of the contamination with red tape and left it, cleaning up the remainder of the contamination she had found. (Complaint paragraphs 16 & 17) As a result of Ms. English's complaints and her persistence, many of the safety concerns were ultimately addressed and contamination in the Chemet Lab was removed.

From the time that Ms. English marked the contamination on March 10, until she was able to show it to her supervisor on March 12th, several other shifts worked in the Chemet Lab. None of the employees on any of the

other shifts cleaned up the contamination or brought it to the attention of their supervisors. (Complaint paragraph 17) In spite of the fact that employees on at least two other shifts had observed the contamination and failed to clean it up, no action of any kind was undertaken by respondent with respect to any workers on those shifts. (Complaint paragraph 27)

On March 15, 1984, Ms. English was falsely charged by respondent with five violations of company or NRC requirements. (Complaint paragraph 19) At that time she was removed from the Chemet Lab under guard as if she were a criminal. (Complaint paragraph 24(a)) After an internal company appeal, all charges against Ms. English were dropped except the claim that she failed to clean up radiation contamination. (Complaint paragraph 21) On the strength of that one allegation, and without taking disciplinary action against other workers who had failed to clean up the same contamination, Ms. English was permanently removed from her quality-control position in the Chemet Lab, barred from any controlled area, and given a menial "make-work" position in another building on site. (Complaint paragraph 21)

The respondent further advised Ms. English that she would have to bid for any suitable position in the plant that became available in a non-controlled area, and that if she did not obtain such a position within 90 days, she would be discharged. As no such position became available within the time limits set by respondent, Ms. English was discharged on July 30, 1984. (Complaint paragraphs 25 & 26) During a period of at least three and a half months leading up to her discharge, Ms. English was never given any meaningful work, subjected to requirements and "rules" that were not applied to other employees, placed under constant surveillance by management, and completely isolated from her fellow employees to the point of not even being allowed to eat her lunch in



the company lunch room with fellow workers. (Complaint paragraphs 5, 21(c), 24(b), 24(c) & 26)

As a result of respondent's treatment of Plaintiff before her discharge, Ms. English suffered and continues to suffer from a severely depressed and emotional condition. (Complaint paragraphs 36, 37 & 38) Although she has made diligent efforts to find other comparable employment, her efforts have been unsuccessful causing her substantial financial difficulties. (Complaint paragraph 35)

This action was filed on March 13, 1987, in the United States District Court for the Eastern District of North Carolina. It is a diversity action in which Ms. English asserted tort claims under North Carolina law for wrongful discharge and intentional infliction of emotional distress. Ms. English also asserted claims for punitive damages associated with each of the two tort claims.<sup>1</sup>

Prior to the filing of an answer, Ms. English amended her complaint to slightly modify paragraphs 7 and 42.

<sup>1</sup> The complaint in this case was filed following an administrative proceeding in which an Administrative Law Judge issued a decision favorable to Ms. English on August 1, 1985. A copy of that decision is included in the Appendix to this Petition. The Secretary of Labor subsequently reversed that decision on the grounds that Ms. English's complaint was untimely. That decision was appealed to the Fourth Circuit, which affirmed the ruling of "untimeliness", but remanded the case for a ruling by the Secretary on the question of whether Ms. English might be entitled to establish a claim on the theory of continuing violation. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). That issue is currently before the Secretary and has been briefed by the parties.

Essentially concurrent with the DOL proceeding, Ms. English filed a petition with the Nuclear Regulatory Commission under 10 CFR Part 2.206, asking that penalties and damages be assessed against General Electric. The NRC has recently issued an order in that matter, citing General Electric for penalties, but rejecting any compensation for Ms. English. That decision is also contained in the Appendix to this Petition.

On or about May 5, 1987, without filing an answer, respondent moved to dismiss the Complaint pursuant to Federal Rules 12(b)(1) and 12(b)(6). On May 7, 1987, respondent similarly moved to dismiss the Amended Complaint.

On February 12, 1988, the Honorable F.T. Dupree, Jr., entered an Order ruling on respondent's motion. In that Order Judge Dupree concluded that Ms. English had not stated a good cause of action for wrongful discharge, and granted petitioner's motion pursuant to Rule 12(b)(6) with respect to that claim (Appendix, p. 25a); however, Judge Dupree concluded that Ms. English *had* stated a good cause of action for intentional infliction of emotional distress, and denied respondent's Rule 12(b)(6) motion with respect to that claim. (Appendix, p. 27a) Judge Dupree also analyzed the impact of Section 210 of the Energy Reorganization Act, 42 USC Section 5851, and concluded that that provision was an exclusive remedy for Ms. English, preempting all of her state tort claims. He therefore granted respondent's motion pursuant to Rule 12(b)(1) with respect to both tort claims. (Appendix, p. 29a)

From this Order and Judgment Ms. English filed a timely notice of appeal to the Fourth Circuit Court of Appeals, pursuing an appeal solely with respect to her claim for intentional infliction of emotional distress; respondent cross-appealed.

On April 3, 1989, the Fourth Circuit issued its decision in this matter. It rejected respondent's cross-appeal and affirmed the ruling that Ms. English had stated a good cause of action for intentional infliction of emotional distress. However, the Court also affirmed the ruling that Ms. English's state tort claim was preempted by the "whistleblower" provisions of the Energy Reorganization Act, 42 USC Section 5851.

On April 14, 1989, Ms. English filed a timely Petition for Re-Hearing with the Fourth Circuit. By order of April 28, 1989, that Petition was denied. (Appendix, pp. 4a-5a)

#### REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Decision Below Conflicts With The Respect For The Rights Of States As Reflected In *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290. (1977), *Lingle v. Norge Division of Magic Chef*, 486 U.S. — (1988) and *San Diego Building Trades Council v. Garmon*, 359 U.S. 276 (1959).

A cause of action for intentional infliction of emotional distress was first expressly recognized by North Carolina courts in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611, 623 (1979), a case involving the breach of a separation agreement. While *Stanback* may have been the first case that expressly recognized the claim, the court discussed in detail earlier cases that clearly were grounded in such a theory (254 S.E.2d at 622). In *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936), the defendant's collection agent verbally abused plaintiff in a "profane and malicious manner" on at most two occasions. These actions were found sufficient to create a claim. Similarly, in *Crews v. Provident Finance Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967), the plaintiff alleged that she was verbally abused on one occasion by a collection agent, and she became angry and upset as a result of this single instance of abuse. Again, these facts were sufficient to support her claims.<sup>2</sup> Thus claims like those

<sup>2</sup> At least part of these holdings seem to rely on the particular condition or susceptibility of the plaintiff. In *Kirby* the plaintiff was seven months pregnant at the time she was verbally abused. In *Crews* the plaintiff was apparently susceptible to angina attacks and did suffer such an attack as a result of the abuse. The condition or "susceptibility" of Ms. English supports her claim that Defendant's actions towards her were highly outrageous. In the hearing before the Administrative Law Judge, General Electric contended "... that Ms. English was a high strung, nervous

made by Ms. English have been recognized by North Carolina courts for more than 50 years.

The concern of North Carolina addressed through a tort action for intentional infliction of emotional distress is to prevent maliciously destructive and disruptive conduct towards North Carolina's citizens. As stated by Judge Phillips in *Woodruff v. Miller*, 64 N.C.App. 364, 307 S.E.2d 176, 178 (1983):

Fortunate it is for our people and society that such maliciously destructive and disruptive conduct is regarded as extreme and outrageous—rather than normal and acceptable—and that our law provides an orderly way for the community to disapprove of it and compensate those victimized by it.

As recognized by Judge Dupree and affirmed by the Fourth Circuit, this same type of claim, addressing the same state concern about conduct towards its citizens, has been recognized by the North Carolina courts in the employment situation. *Dixon v. Stuart*, 85 N.C.App. 338, 354 S.E.2d 757 (1987). It is such outrageous conduct of respondent towards Ms. English that violates North Carolina's strong state interest in providing Ms. English with the remedy she is attempting to address in the present action.<sup>3</sup>

The decision below conflicts with this Court's unanimous decision in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), that a tort action for in-

woman with marked and emotional reactions . . ." (Appendix, p. 41a), and "... that Complainant was an unusually excitable individual. . .". (Appendix, p. 42a) Thus respondent certainly had knowledge that Ms. English would be susceptible to the harassment, surveillance and ridicule that it directed towards her, thereby making its actions even more outrageous. Hence, Ms. English's claim for punitive damages—which even the district court acknowledged was not a form of remedial relief available under the whistleblower provisions of section 210 (Appendix, at p. 18a)—was well stated in her tort complaint.

<sup>3</sup> As found by the Administrative Law Judge, Ms. English was subjected to an "inquisition". (Appendix, p. 43a)



tentional infliction of emotional distress is not preempted by the National Labor Relations Act. *Farmer* indicates that a court should examine the state's interest in regulating the conduct in question, when considering a question of preemption. 430 U.S. 297. In addition, the decision recognizes the importance of regulating outrageous conduct, as North Carolina does in the tort of infliction of emotional distress.

Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct . . . which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." Thus . . . permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct.

430 U.S. at 302 (citations omitted). The same concerns expressed by this Court in *Farmer* apply in the present case.

Judge Dupree concluded that Section 210 of the ERA, by itself, constitutes a scheme so pervasive and comprehensive with respect to nuclear workers' protection that it preempts state tort actions of whatever sort. Appendix, p. 22a) Plaintiff does not agree with this conclusion, and asserts that the legislative history does not support it. But even if Judge Dupree is correct, *Farmer* clearly allows a state to supplement the federal remedies, given a compelling state interest, and as long as such "supplementation" does not conflict with the federal statute. Judge Dupree recognized that such an exception to preemption existed under *Farmer*, but rationalized that *Farmer* did not apply primarily because there was an overlapping of state and federal remedies:

In this action, plaintiff has a federal remedy in Section 210. That Section specifically addresses "other discrimination" and provides for compensatory damages in the case of a violation."

(Appendix, p. 28a)

However, Judge Dupree's rationale has been specially rejected by this Court's recent decision in *Lingle v. Norge Division of Magic Chef*, 486 U.S. —, 100 L.Ed.2d 410 (1988) (Decided after Judge Dupree's decision in this case). The issue in *Lingle* was whether a state action for wrongful discharge was preempted by the National Labor Relations Act. There was almost total overlap of the damages available to the plaintiff in *Lingle*; and in fact, at the time the case was heard by this Court, plaintiff had filed a grievance under the collective bargaining agreement and had already received full back pay and reinstatement through that proceeding. 486 U.S. at —, 100 L.Ed.2d at 416. Those factors notwithstanding, this Court concluded that the state action constituted a "separate font" of substantive rights that were not preempted by federal law. 486 U.S. at —, 100 L.Ed.2d at 422. For similar reasons, *Lingle* would require reversal of the decision below to afford Ms. English the right to pursue her separate, non-federal claims.

This Court has consistently expressed deference to the concerns and enactments of the states, finding preemption only where Congress has clearly and expressly occupied the entire field, or where there is an actual conflict with federal law. This respect for the rights of the states has been especially evident in the employment area.<sup>4</sup> As this Court has stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959):

<sup>4</sup> See, e.g., *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (State action for assault not preempted.); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (State action for malicious libel not preempted.); *Sears Roebuck Co. v. Carpenters*, 436 U.S. 180 (1978) (State action for trespass not preempted.); *Belknap v. Hale*, 463 U.S. 491 (1983) (Common law action for fraud and breach of an employment contract not preempted.); *Fort Halifax Packing Company v. Coyne*, 482 U.S. —, 96 L.Ed.2d 1 (1987) (State statute requiring employers to provide severance pay to employees in the event of a plant closing, not preempted by ERISA or NLRA.).

Due regard for the presuppositions of our embracing federal system, including the principle of the diffusion of power not as a matter of doctrinaire localism but as a matter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the federal regulation.

Outrageous conduct inflicting severe emotional distress was, at best, a peripheral concern of Section 210 of the ERA. Under the decisions of this Court, North Carolina should not be precluded by Section 210 from protecting its citizens from such conduct, and Ms. English should be allowed to proceed to trial on her state tort claims.

**B. The Decision Below Conflicts With The Holding Of This Court In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987).**

The lower court preempted state tort law on the ground that there was an "irreconcilable conflict between the federal and state standards" concerning employee relations at commercial nuclear facilities, and that this conflict would "frustrate the objectives of federal law." (Appendix, p. 19a) In making these findings the lower court turned the law of federal preemption on its head.

The lower court essentially looked at the language of Section 210 of the Energy Reorganization Act, and particularly at 42 USC Section 5851(g), and articulated three hypothetical circumstances in which Section 210 and state law might possibly conflict. But nothing in the record supported a finding that such conflicts actually existed—particularly since this matter was before the court on a Rule 12(b)(6) motion. Hence, the holding below that Ms. English's claims were preempted was based solely on the hypothetical possibility that state-federal conflicts may exist; and that approach was contrary to the legal standard which should have been applied.

In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987) this Court articulated the correct standard for applying such hypothetical reasoning to preemption cases:

"To defeat Granite Rock's facial challenge [that the Coastal Commission's actions were preempted], the Coastal Commission *needed merely to identify a possible set of permit conditions not in conflict with federal law.*" )

480 U.S., at 593 (Emphasis added).

Hence, the party attempting to find preemption may not rely on hypothetical circumstances to justify preemption; rather, to defeat a preemption challenge a party need only "identify a possible" set of "conditions *not* in conflict with federal law." The standard enunciated in *California Coastal Commission* provides the only logical rationale. Since hypothetically virtually every state law could be arguably found to conflict with federal law, the decision below invites imaginative preemption advocates to create bases for totally engulfing and abolishing states' rights.

Thus, under the rationale and ruling of the lower court that Section 210 is the exclusive remedy for employees at General Electric's fuel processing plants, those employees are now presumably denied any of the protections of the following North Carolina statutes:

N.C.Gen.Stat. Section 143-422.2

prohibition against discrimination in employment on the basis of race, religion, color, national origin, age or sex.

N.C.Gen.Stat. Section 97-6.1

protection from retaliation for filing a worker's compensation claim.<sup>5</sup>

<sup>5</sup> In *Lingle, supra*, this Court expressly disallowed a company's preemption defense, and authorized a worker's state compensatory and punitive damage action to proceed, where the claimed basis for the worker's tort damages were bottomed on a comparable provision



N.C.Gen.Stat. Section 95-130 (8)

protection from retaliation for filing a complaint under the North Carolina Occupational Safety and Health Act.

N.C.Gen.Stat. Section 95-25.20

protection from retaliation for filing a complaint under the North Carolina Wage and Hour Act.

N.C.Gen.Stat. Sections 96-15.1 and 15.2

protection from retaliation for being a witness in an unemployment compensation hearing.

N.C.Gen.Stat. Chapter 168A

protection from discrimination in employment on the basis of being handicapped.

While the lower court's decision does not expressly preempt the state laws cited above, the rationale of that decision certainly compels such a conclusion. As noted, it is an easy task to construct hypothetical situations involving each of these state statutes that might possibly conflict with the provisions of Section 210 of the ERA, and thus support preemption under the lower court's ruling. Indeed, there is certainly nothing to clearly distinguish the preemption of Petitioner's state tort claim for intentional infliction of emotional distress, from each of these state statutes affecting the employer-employee relationship.

We stress that there are no *facts* on the record in this case which actually show that Ms. English's claims conflict with, or would in any way frustrate, the purposes of any federal law. As this Court stated in *California Coastal Commission*:

... we hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that *in fact* conflicts with federal law.

480 U.S. 594 (emphasis added).

of Illinois law protecting workers against retaliatory discharge for filing worker's compensation claims.

The important power of the states to articulate their own body of law should not be discarded on the mere possibility that a facial challenge could be made, or that a court might interpret state law in such a manner as to conflict with federal law. The courts of North Carolina must be free to develop their own tort law in cases such as this. Federal courts, sitting in diversity, can reasonably predict the rules of law that the courts of North Carolina will adopt. And given the strong recognition that North Carolina's courts have afforded to claims of infliction of emotional distress in fashioning the state's tort remedies, the court below should have given cognizance, as well as equal accommodation, to both the Supremacy Clause of the U.S. Constitution and the law of the State of North Carolina, and found that Ms. English's tort claims do not irreconcilably conflict with 42 USC section 5851 (g).

#### C. The Decision Below Conflicts With The Holding Of This Court In *Decanas v. Bica*, 424 U.S. 351 (1976).

*Decanas* was an action to enforce a California statute prohibiting the employment of undocumented alien farmworkers. The issue before the Court was whether the state statute was preempted by the Immigration Act. The argument for preemption was especially strong in this situation as the "Power to regulate immigration is unquestionably exclusively a federal power." 424 U.S. at 354.

In upholding the California statute, this Court recognized that "States possess broad authority . . . to regulate the employment relationship to protect workers within the State." 424 U.S. at 356. Thus this Court concluded that the statute was valid, even in the face of the unequivocally exclusive federal power in the area of immigration, and ". . . even if such local regulation has some purely speculative and indirect impact on immigration . . ." 424 U.S. at 355.

As set forth above, North Carolina has recognized the tort of infliction of emotional distress in the employment situation. *Dixon, supra*. North Carolina has done so to protect its citizens and workers from outrageous conduct by employers. The protection of North Carolina's workers from such outrageous conduct is surely of sufficient concern to bring it within the "broad authority" of the State recognized by this Court in *Decanas*; and certainly beyond an assault based solely on some purely speculative and indirect impact on Section 210 of the ERA.

The court in *Decanas* also indicated that in the context of the employment relationship, considerable deference should be given to the power and rights of states, and that preemption is required in only the most clear and extreme cases:

Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was "the clear and manifest purpose of congress" would justify that conclusion.

424 U.S. at 357 (citation omitted). Hence, as there is nothing to show such a "clear and manifest purpose" to oust state power in the area of state damage actions based on state tort laws, the decision below should be reversed and Ms. English's claim for emotional distress should be allowed to proceed to trial.

**D. The Decision Below Conflicts With This Court's Decision In *Pacific Gas and Electric Co. v. Energy Resources Commission*, 461 U.S. 190 (1981), And *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984).**

The two cases decided by this Court in the field of atomic energy confirm that Ms. English's claim for infliction of emotional distress is not preempted.

*Pacific Gas and Electric v. Energy Resources Commission*, 461 U.S. 190 (1983), required this Court to

determine whether the Atomic Energy Act preempted state law prohibiting the certification of new nuclear plants until a technology for the disposal of nuclear wastes existed. In analyzing that question, this Court concluded that the federal government has preempted the entire field of nuclear safety, preventing any state regulation or "supplementation" of that field. 461 U.S. at 212. At the same time, the Court found that where state (California) legislation relating to the nuclear industry had an economic, rather than nuclear safety purpose, such state law was not preempted. 461 U.S. at 216. The argument that the state statute conflicted with the federal statutes and regulations was also rejected, because compliance with both the state and federal statutes was possible. 461 U.S. at 219.

Likewise in *Silkwood v. Kerr McGee*, 464 U.S. 238 (1984), this Court upheld a state tort action for damages arising out of exposure to radiation as a result of inadequate nuclear safety procedures. In spite of the implication of nuclear safety issues in *Silkwood*, and the complete federal preemption of that field recognized in *Pacific Gas and Electric, supra*, this Court concluded that a state claim for compensatory or punitive damages was not preempted. The conclusion was that preemption would exist only if a very stringent test were met:

... preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damage action would frustrate the objectives of the federal law.

464 U.S. at 256.

Judge Dupree correctly concluded in the decision below that Section 210 is not a statute regulating nuclear safety concerns, and thus absolutely "preempting" under



*Pacific Gas and Electric*, but one primarily focused on employee protection and employee-employer relations. (Appendix, p. 19a) Yet he found preemption based on inference: that Section 210 *itself* is a scheme of regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (Appendix, pp. 22-23a) And Judge Dupree then built upon this inferential conclusion by hypothesizing "conflicts" between Section 210 and the state action, to meet the *Silkwood* requirement of an "irreconcilable conflict" between state and federal standards. (Appendix, pp. 19-22a)

The conflicts hypothesized by Judge Dupree cannot support a claim of preemption under this Court's decisions. Given that North Carolina's action for infliction of emotional distress is concerned with regulating outrageous conduct toward its citizens (*Woodruff, supra*), and has nothing whatsoever to do with regulating nuclear power or nuclear safety, it is clear that, under *Pacific Gas and Electric* and *Silkwood*, a case for preemption does not exist.

**E. There Is Conflict Among The Courts Concerning The Preemption Of State Claims By Federal Employment Statutes.**

This Court should grant this Petition and take jurisdiction of this case to provide guidance to state and federal courts on the issue of preemption of state claims by federal "whistle-blowers" and in the employment relations contexts.

Section 210 is not the only federal "whistleblower" statute. There are at least seven such statutes, having similar and often identical provisions. Kohn, *Protecting Environmental and Nuclear Whistleblowers* (1985). De-

cisions on the issue of preemption under these various acts are conflicting, requiring guidance from this Court to bring some order and uniformity in this area. Likewise, decisions on the issue of preemption under the NLRA suggest a conflict with the decision below, also requiring this Court's guidance.

With respect to Section 210, two federal district courts and two state supreme courts addressed the issue of preemption in reported decisions prior to the publication of the decision in this case. In *Stokes v. Bechtel North American Power Corp.*, 614 F.Supp. 732 (N.D.Cal. 1985), the court concluded that a state wrongful discharge claim was not preempted by Section 210. However, in *Snow v. Bechtel Construction*, 647 F.Supp. 1514 (C.D.Cal. 1986), the court concluded that a state claim for wrongful discharge was preempted.

In *Wheeler v. Caterpillar Tractor Co.*, 108 Ill.2d 502, 485 N.E.2d 372 (1985), *cert. den.*, 475 U.S. 1122 (1986), the Illinois Supreme Court concluded that a state wrongful discharge claim was not preempted by Section 210. The Kansas Supreme Court has recently reached a contrary conclusion. *Chrisman v. Phillips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140 (1988).

The four decisions just cited all involved claims for wrongful discharge, not other common law torts. The present case is the only case of which Petitioner is aware where essentially all forms of state torts were deemed preempted by Section 210. In contrast, *Norris v. Lumberman's Mutual*, 687 F.Supp. 699 (Mass. 1988), concluded that while retaliatory discharge claims were preempted by Section 210, a claim for tortious interference with contract could proceed.

The decision below also conflicts with the rationale and general trend in cases arising in the employer-employee, labor relations context. Thus a number of courts have held, in contrast to Judge Dupree's and the Fourth Cir-

cuit's decision in this matter, that claims based on state statutes or torts are not preempted. *See, e.g., Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2nd Cir. 1987) (Retaliation claim under Connecticut workers' compensation law not preempted.); *Keehr v. Consolidated Freightways*, 825 F.2d 133 (7th Cir. 1987) (Claims for invasion of privacy and infliction of emotional distress not preempted.); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987) (Action for wrongful discharge founded on state occupational safety and health law not preempted.); *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884 (10th Cir. 1987) (Blacklisting claims under state law not preempted.); *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988) (Claim for discrimination under state handicapped law not preempted.); *Smolarek v. Chrysler Corp.*, 858 F.2d 1165 (6th Cir. 1988) (Claims for handicapped discrimination under state law and retaliatory discharge not preempted.); and *Merchant v. American Steamship Co.*, 860 F.2d 204 (6th Cir. 1988) (Wrongful discharge claim not preempted.).

### CONCLUSION

Two different federal administrative agencies have concluded that Ms. English was treated outrageously and unfairly by General Electric, yet she has received no compensation for the very serious wrongs she has suffered. As set forth above, the decisions below are inconsistent with this Court's decisions on preemption generally, and more specifically with its decisions in the area of employment relations. For the reasons set forth above, Petitioner respectfully requests that the Court grant this Petition and issue its writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the opinion of that court in Petitioner's case.

Respectfully submitted this the 27th day of July, 1989.

### Of Counsel:

M. TRAVIS PAYNE  
EDELSTEIN, PAYNE & NELSON  
P.O. Box 12607  
Raleigh, N.C. 27605  
(919) 828-1456

ARTHUR M. SCHILLER  
Attorney at Law  
21 DuPont Circle, N.W.  
Suite 401  
Washington, D.C. 20036  
(202) 857-5658  
*Counsel for Petitioner*

## **APPENDIX**

## APPENDIX TABLE OF CONTENTS

	Page
Opinion of the Court of Appeals .....	1-3a
Order of the Court of Appeals Denying Petition for Rehearing .....	4-5a
Opinion and Order of the District Court .....	6-29a
Decision of the Administrative Law Judge in <i>English</i> <i>v. General Electric</i> , 85-ERA-0002 (August 1, 1985) ..	30-56a
Order of the Nuclear Regulatory Commission in Docket No. 70-1113 (March 13, 1989) .....	57-58a



1a

APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 88-3976

---

VERA M. ENGLISH,  
*Plaintiff-Appellant*  
versus

GENERAL ELECTRIC COMPANY,  
*Defendant-Appellee*

GOVERNMENT ACCOUNTABILITY PROJECT,  
*Amicus Curiae*

---

No. 88-3982

---

VERA M. ENGLISH,  
*Plaintiff-Appellee*  
versus

GENERAL ELECTRIC COMPANY,  
*Defendant-Appellant*

GOVERNMENT ACCOUNTABILITY PROJECT,  
*Amicus Curiae*

Appeal from the United States District Court  
for the Eastern District of North Carolina, at Wilmington  
Franklin T. Dupree, Jr,  
Senior District Judge—(CA-87-31-7-CIV)

---

Argued: December 5, 1988

Decided: April 3, 1989

---

Before RUSSELL, WIDENER, and HALL, Circuit  
Judges.

---

M. Travis Payne (EDELSTEIN AND PAYNE; Mozart G. Ratner, on brief) for Appellant/Cross-Appellee. Peter G. Nash (Diane L. Atwater, OGLETREE, DEAKINS, NASH, SMOAK AND STEWART; William W. Sturges, WEINSTEIN & STURGES, on brief) for Appellee/Cross-Appellant. (Stephen M. Kohn, Michael D. Kohn, GOVERNMENT ACCOUNTABILITY PROJECT, on brief) for Amicus Curiae.

PER CURIAM:

In this diversity action, Vera M. English appeals the district court's order dismissing her complaint on the ground that her state tort claim was preempted by federal law. The defendant, General Electric Company ("G.E."), cross-appeals from the district court denial of its motion to dismiss English's claim on the alternative ground that such claim failed to state a cause of action under North Carolina law. Finding no error, we affirm.

English was employed by G.E. as a laboratory technician at a nuclear fuel production facility in North Carolina. In February, 1984, she complained to both the Nuclear Regulatory Commission ("NRC") and her supervisors at the G.E. facility regarding what she believed to be serious violations of NRC safety standards. When no corrective action was taken, she deliberately failed to clean up radiation contamination at her work station in an effort to prove to her supervisor that such contamination was not being detected by the facility's safety inspectors. Although her efforts led to corrective action, she was disciplined by the company for her failure to clean up contamination of which she was aware. It is the measures allegedly taken by G.E. to discipline her that formed the basis for her tort claim of intentional infliction of emotional distress.<sup>1</sup>

<sup>1</sup> English's complaint also included a state tort claim for wrongful discharge; she has not, however, appealed the district court's dismissal of this claim.

The district court held that English had, under North Carolina law, stated a good cause of action for the tort of intentional infliction of emotional distress. However, the court further determined that the "whistleblower" provisions of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, were intended by Congress to constitute the sole remedy for nuclear facility employees who allege discrimination resulting from safety complaints and, therefore, English's state claim was preempted by the federal statute. On appeal, English contends that the lower court erred in ruling that Congress intended to foreclose whistleblowers from state tort remedies. In its cross-appeal, G.E. contends that English's allegations did not amount to the tort of intentional infliction of emotional distress and therefore, that the court erred in denying G.E.'s motion to dismiss on the alternative Fed. R. Civ. P. 12(b)(6) ground.

Upon full consideration of the record, briefs, and oral argument, we conclude that the lower court correctly determined that English stated a claim but that the claim was preempted by the ERA's "whistleblower" provisions. The district court's opinion has correctly identified and applied the relevant federal and state law. We therefore affirm the order dismissing the complaint for the reasons expressed by the district court. *English v. General Electric Co.*, 683 F. Supp. 1006 (E.D. N.C. 1988).<sup>2</sup>

*Affirmed*

<sup>2</sup> We have also had occasion to examine English's claim in the context of a complaint filed with the United States Department of Labor pursuant to the ERA's whistleblower provisions. On appeal to this court from the agency's dismissal of her claim as being time-barred, we held that a claim for "retaliatory harassment" is cognizable under the ERA and that compensatory damages are available. The case was remanded to the Secretary of Labor for consideration of English's retaliatory harassment claim. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988).

4a

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 88-3976

---

VERA M. ENGLISH,  
*Plaintiff-Appellant*  
v.

GENERAL ELECTRIC COMPANY,  
*Defendant-Appellee*  
GOVERNMENT ACCOUNTABILITY PROJECT,  
*Amicus Curiae*

---

No. 88-3982

---

VERA M. ENGLISH,  
*Plaintiff-Appellee*  
v.

GENERAL ELECTRIC COMPANY,  
*Defendant-Appellant*  
GOVERNMENT ACCOUNTABILITY PROJECT,  
*Amicus Curiae*

---

On Petition for Rehearing with Suggestion  
for Rehearing In Banc

---

5a

ORDER

[Filed April 28, 1989]

---

The appellant/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and as the panel considered the petition for rehearing and is of the opinion that it should be denied, IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Russell and Judge Widener.

For the Court,

/s/ John M. Greacen  
Clerk



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
NORTH CAROLINA  
WILMINGTON DIVISION

---

No. 87-31-CIV-7

---

VERA M. ENGLISH,

*Plaintiff*

vs.

GENERAL ELECTRIC COMPANY,

*Defendant*

---

ORDER

[Filed Feb. 12, 1988]

Plaintiff, Vera M. English, filed this diversity action against defendant, General Electric Company (GE), alleging common law causes of action for wrongful discharge in violation of public policy and intentional infliction of emotional distress. As relief plaintiff seeks \$1,328,645 in compensatory damages and punitive damages in the amount of five percent of the net worth of defendant GE (or approximately \$2.3 billion). The action is before the court on defendant's motion pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss the instant complaint on the grounds that the alleged causes of action are preempted by federal law such that the court lacks jurisdiction over the subject matter and the plaintiff has failed to state causes of action under North Carolina law upon which relief can be granted. F.R.Civ.P. 12(b)(1) and (6). For the rea-

sons which follow, defendant's motion pursuant to Rule 12(b)(1) as to the entire complaint will be granted. Further, defendant's 12(b)(6) motion will be granted as an alternative basis for dismissal only as to plaintiff's claim for wrongful discharge.

When confronted by a motion to dismiss a complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). The factual allegations upon which defendant GE's motion to dismiss must be resolved, as taken from the complaint, are as follows:

I. FACTUAL ALLEGATIONS

From November 13, 1972 until March 15, 1984, plaintiff English was employed as a radiation laboratory technician in the Chemical Metallurgical Laboratory (Chemet Lab) of defendant's GE's Nuclear Fuel Manufacturing Department (NFMD) in Wilmington, North Carolina. At the NFMD nuclear fuel is produced using radioactive materials, principally uranium. As a source of quality control the Chemet Lab performs metallurgical, environmental, chemical and spectrographic analyses on small uranium samples to assure that standards of the Nuclear Regulatory Commission (NRC) are met. Plaintiff's job consisted of assuring an accurate measure of uranium in GE's uranium powder fuel pellets.

In February 1984 plaintiff began taking action to correct what she perceived as serious violations of safety standards at GE's NFMD. On February 13, 1984, plaintiff reported to the NRC that many safety hazards and illegal practices were present in the Chemet Lab, and that corrective action had not been taken even though

GE had been made aware by her of similar hazards and practices in the Lab. On February 24, 1984, plaintiff forwarded essentially the same complaints to Mr. E. A. Lees, the Quality Assurance Manager (later General Manager) of GE's NFMD.

During the period of March 5-9, 1984, plaintiff spent considerable work time cleaning up radiation contamination at and around her work station, apparently left there by workers on preceding shifts. On March 5 plaintiff asked a "Rad Safety" man (specifically trained personnel who, using special instruments, detect uranium contamination) to check out her work area to see whether he would discover the pile of contaminated nuclear materials she had collected and swept to the rear of her work table. The man declared plaintiff's area free of contamination. At the end of her shift plaintiff cleaned up the pile of contaminated matter which the Rad Safety man had not detected. At the conclusion of her work shift on March 10 plaintiff:

decided that the only way to convince management of the validity of her concerns about the dangerous conditions in the Chemet Lab and of other workers' failure[s] to follow safety procedures, charges she had raised before without GE properly responding, was to identify some of the areas of radiation contamination with red tape (used to mark off radiation hot spots) and have her regular supervisor, Mr. William Lacewell, see the conditions when he and she were next on duty, which would be on the evening of March 12.

#### Complaint ¶ 16.

Upon beginning her shift on March 12, 1984, English showed her supervisor the marked-off areas of contamination, areas which were undisturbed by interim shift workers. Plaintiff also informed her supervisor of the Rad Safety man's failure to detect contamination on her

work bench on March 5. Following plaintiff's discussion parts of the Chemet Lab were shut down whereby many of the safety problems identified by English were fixed and the contaminated areas were cleaned.<sup>1</sup> *Id.* ¶ 18.

In a letter dated March 15, 1984, GE charged plaintiff with several violations of GE and/or NRC requirements, including: (1) unauthorized removal of a personal nuclear survey instrument from the entrance to the laboratory for use elsewhere in the plant; (2) deliberate contamination of a table; (3) failure to clean up contamination, knowing it existed; (4) the continued distraction of other laboratory employees; and (5) disruption of normal laboratory activities. Plaintiff alleges that "GE management conspired to fraudulently charge that Mrs. English violated GE safety rules and criminal statutory prohibitions which they knew did not exist or the violation of which they knew did not occur." *Id.* ¶ 31. According to English, all charges save No. 3 were dropped "because they were deemed demonstrably false or not capable of substantiation." *Id.* ¶ 20. As punishment for charge No. 3, GE removed plaintiff from the Chemet Lab under guard "as if she were a criminal[,] exposing her to the contempt and ridicule of fellow employees," *id.* ¶ 24; barred her entry into the Chemet Lab or from employment in or entry to any controlled areas in the NFMD, *id.* ¶ 21; and indefinitely assigned her to menial "make work" in Building "J" and the Central Stores Warehouse, *id.* According to plaintiff, "[i]nternal management documents establish that the purpose of these measures was to punish Mrs. English for what management termed her 'subversive' activity and to prevent Mrs. English from continuing to obtain evidence to prove that management was failing adequately to police com-

<sup>1</sup> On a somewhat contradictory note plaintiff alleges that "[p]rior to March 15, 1984, Mrs. English's complaints to management had been ignored by management and management had disparaged and derided her as paranoid." Complaint ¶ 9.



pliance with NRC safety and quality regulations." *Id.* ¶ 22. In addition to the punishment imposed upon charge No. 3, English was watched constantly by a member of management from a desk overlooking hers in Building J. isolated from her fellow workers, "and not even permitted to each lunch in the company lunch room with them. *Id.* ¶ 24.

On April 30, 1984, GE's management informed English that she would have to "bid" for a position in the NFMD, other than in the Chemet Lab or other controlled area, and if no position was available within ninety days she would be placed on a 'lack of available work' status." Eighty-nine days later, on July 29, 1984, plaintiff was sent home to change into safety shoes "although plant rules did not require that anyone in the area in which she was working wear safety shoes." *Id.* ¶ 26. The next day, July 30, 1974, having obtained no other position, GE fired English. Since her discharge plaintiff has been unable to find acceptable employment and has been impoverished. *Id.* ¶ 35.

Plaintiff alleges GE's actions were intended to teach her a lesson and make an example out of her because she raised safety concerns, "the resolution of which caused, was causing and would continue to cause delay in production at the GE plant, embarrass GE with its principal regulator, the NRC, and encourage other employees to observe, prove and report GE's sloppy and potentially dangerous safety procedures." *Id.* ¶ 29. According to English, GE's treatment of her was "clearly discriminatory" because no investigation was undertaken with respect to any workers on shifts between March 10 and 12 (when plaintiff had marked off contaminated areas) and because similar failures to clean up contamination by other employees had "never resulted in the kind and severity of disciplinary treatment meted out by GE to Mrs. English." *Id.* ¶ 27.

In Count 1 of the complaint plaintiff alleges her discharge by GE was wrongful and "in violation of the strong public policies embodied in the laws of the United States, which encourage and require safe operation of nuclear facilities and require workers to report potential violations of NRC regulations." *Id.* ¶¶ 41-42. In Count 2 plaintiff alleges her discharge constituted a "gross, wanton and reckless violation of public policy and disregard of her rights, and was done with actual malice entitling her to punitive damages against GE." *Id.* ¶¶ 43-44. Plaintiff also alleges that as a result of defendant's intentional, malicious, extreme and outrageous conduct, she now suffers a severely depressed and emotional condition which has required professional psychiatric treatment. *Id.* ¶¶ 36-38. Hence, plaintiff seeks compensatory damages in Count 3 and punitive damages in Count 4 for intentional infliction of emotional distress. *Id.* ¶¶ 45-51.

Defendant GE has moved to dismiss plaintiff's entire complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Defendant argues that plaintiff's claims, are preempted by federal law in that they concern matters of nuclear safety and are specifically preempted by Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, commonly referred to as "the whistle blower provision." Defendant further contends that even if plaintiff's claims are not preempted, plaintiff has failed to state valid causes of action for wrongful discharge and intentional infliction of emotional distress under North Carolina law. Specifically, defendant argues that North Carolina does not recognize a general public policy exception to the employment at will doctrine and that defendant's conduct concerning plaintiff was not outrageous.



## II. PREEMPTION

### A. The Law

Federal preemption generally may occur in either of two ways. Where Congress evidences an intent, either expressly or inferentially, to occupy a given field, state laws falling within the field are preempted. *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 284 (1984) (citations omitted). For instance, matters of nuclear safety regulation are committed exclusively to the federal government. *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 212 (1983). On the other hand, if the federal government does not "occupy the field," preemption turns on whether the state law conflicts with the federal law to the extent it is impossible to comply with both or whether the state law frustrates the purposes and objectives of Congress. *Silkwood*, 464 U.S. at 248 (citations omitted).

Section 210 of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, provides a remedy for employees of nuclear facilities who believe they have been discharged or otherwise discriminated against for making safety complaints concerning the construction or operation of nuclear facilities. The statute specifically provides that no NRC licensee, "may discharge . . . or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because the employee has testified, given evidence, or brought suit or engaged in "any other action to carry out the purposes" of the Atomic Energy Act (AEA) and the ERA. 42 U.S.C. § 5851 (a).<sup>2</sup>

<sup>2</sup> A split of authority has developed in the circuit courts as to whether the provisions of Section 210 protect an employee from retaliation based on purely internal safety complaints or whether participation in "a proceeding" is required. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), and *Consolidated Edison Company of New York, Inc. v. Donovan*, 673

If an employee believes he has been discharged or otherwise discriminated against in violation of the Acts, he may file a complaint with the Secretary of Labor, within thirty days after the violation occurs. *Id.* (b) (2) (A). Within thirty days of the receipt of the complaint the Secretary must conduct an investigation and notify the individuals involved of the results. *Id.* Within ninety days of the receipt of the complaint the Secretary must either deny it or order the offending employer to "(i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant." *Id.* (b) (2) (B). The statute also provides for the payment of all costs and expenses, including attorneys' and expert witness fees, reasonably incurred by the complainant in bringing the complaint upon which an order is issued. *Id.* Section 210 expressly provides for judicial review of the Secretary's order by a United States Court of Appeals. *Id.* (c).

The protection offered by Section 210 is limited. It does not extend to any employee "who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of . . ." the AEA. *Id.* (g).

Finally, an order issued pursuant to Section 210 is subject to civil enforcement. The action to require com-

F.2d 61 (2d Cir. 1982) (Section 210 protects internal safety complaints). *Contra Brown & Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984) (Section 210 is designed to protect only "whistle blowers" who provide information to governmental entities). In this action plaintiff alleges both internal and external complaints (Complaint ¶¶ 10, 12, 17) and would appear to fall within the section.

pliance may be brought in the appropriate United States district court by either the individual on whose behalf the order was entered to the Secretary. *Id.* (d)-(e). If in an action brought by the individual the district court enters a final order directing compliance, the court may award the individual the costs of litigation. *Id.* (e). If the Secretary obtains judicial enforcement of his own order, "the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages." *Id.* (d).

Few courts have considered the question of whether or not Section 210 preempts state causes of action arising from the retaliatory termination of or discrimination against an employee for having voiced nuclear safety concerns. *Snow v. Bechtel Construction Inc.*, 647 F. Supp. 1514 (C.D. Cal. 1986); *Stokes v. Bechtel North American Power Corporation*, 614 F. Supp. 732 (N.D. Cal. 1985); *Wheeler v. Caterpillar Tractor Company*, 108 Ill. 2d 502, 485 N.E. 2d 372 (1985), *cert denied*, 475 U.S. 1122 (1986). In support of their holdings each of these courts either relies on or distinguishes the Supreme Court's decision in *Silkwood v. Kerr-McGee Corporation*, *supra*.

In *Silkwood* the plaintiff, father of the decedent, Karen Silkwood, sought relief under state tort law for radiation injuries suffered by his daughter at a nuclear power plant run by the defendant, Kerr-McGee. The Tenth Circuit Court of Appeals struck the jury's award for punitive damages on the grounds of federal preemption. *Silkwood v. Kerr-McGee Corporation*, 677 F. 2d 908, (10th Cir. 1981). The Supreme Court reversed, holding that the award of punitive damages based on Oklahoma law was not preempted by the Atomic Energy Act. *Silkwood*, 464 U.S. at 258.

In allowing punitive damages on a state claim for radiation injuries the *Silkwood* court homed in on two items: (1) express language by Congress recognizing state tort recoveries and (2) the absence of a federal remedy. The Price-Anderson Act, 42 U.S.C. § 210, an amendment to the AEA, established an indemnification scheme whereby operators of nuclear facilities would have limited liability in the event of any one nuclear accident. *Id.* at 251. "[T]he discussion preceding its enactment and subsequent amendment indicates that Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies." *Id.* at 251-52 (footnote omitted). Further, the court noted the absence of a federal remedy and expressed its disbelief "that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.* at 251 (citation omitted). Clearly, the focus in *Silkwood* was on radiation injuries caused by nuclear accidents and their redress.

Two district courts in California have addressed the precise issue of the preemptive effect of Section 210 on state law causes of action but they differed in result. *Snow v. Bechtel Construction, Inc.*, *supra*; *Stokes v. Bechtel North American Power Corporation*, *supra*. In each case the plaintiff had pursued a state law claim for wrongful discharge.

In *Stokes* the court was "unable to accept the thesis that the enactment of Section 210 requires the invalidation of all preexisting state law remedies for aggrieved employees involved in the field of nuclear power." *Stokes*, 614 F.Supp. at 745. The court's inability stemmed from the *Silkwood* decision and the permissive language found in Section 210 and its legislative history (*i.e.*, *may* file a complaint, *may* apply to the Secretary for review, *could* help assure compliance, *could* seek redress). *Id.* at 744-45. In terms other than permissiveness, the *Stokes* court



failed to address any specific provisions of Section 210 and its history.

In a similar action the *Snow* court concluded that *Stokes* should not govern and respectfully declined to follow it. That court was not persuaded that permissive language was inconsistent with the exclusivity of a federal remedy. Instead, it relied on the legislative history of Section 210 and language in *Olguin v. Inspiration Consolidated Copper Company*, 740 F.2d 1468, 1475 (9th Cir. 1984), indicating that the "whistleblower provision" in the Mine Safety and Health Act was an exclusive remedy that preempted a state claim of wrongful discharge. *Snow*, 647 F.Supp. at 1518. Further, the *Snow* court found *Silkwood* "clearly distinguishable," concluding that the Supreme Court's analysis of radiation injuries was inapposite to a consideration of retaliatory termination. *Id.* at 1519. The court held that "[t]o the extent that *Snow* claims he was wrongfully terminated . . . because he complained about safety violations, his action is preempted by [42 U.S.C.] § 5851." *Id.*

In the only reported state court opinion on this topic the Supreme Court of Illinois held, *sua sponte*, that Section 210 did not preempt a valid cause of action for wrongful discharge. *Wheeler v. Caterpillar Tractor Company, supra*. The court found "the situation here analogous to *Silkwood* and conclude[d] that it was not the Congressional intent to preempt the field." *Id.* at —, 485 N.E.2d at 376. The dissent found the majority's reliance on *Silkwood* "misplaced" and would hold that "plaintiff's cause of action is preempted by section 210." *Id.* at —, 485 N.E.2d at 379 (Moran and Ryan, J.J., dissenting).

## B. Analysis

Defendant GE argues that federal law provides plaintiff with an exclusive remedy for claims of discharge or discrimination in retaliation for voicing concerns of nu-

clear safety. Specifically, defendant argues that plaintiff's complaint concerns matters of nuclear safety—matters that are exclusively regulated by the federal government—and therefore is expressly preempted. Defendant further argues that Section 210 of the ERA provides a detailed procedure for redressing discharge and discrimination claims and that it is so pervasive that exclusivity of federal remedy is inferred. Not surprisingly, plaintiff contends that this action centers on the regulation of the employer-employee relationship and that matters of nuclear safety, if implicated at all, are only peripheral to her claims. Plaintiff further contends that her claims do not conflict with Section 210 such that compliance with both is impossible and that her claims necessarily further the objective of Congress, i.e., providing nuclear employees an unfettered opportunity to speak out on matters of safety.

## 1. The Complaint

With respect to defendant's first argument—that plaintiff's complaint concerns matters of nuclear safety—to some extent defendant is correct. Plaintiff expressly states that her termination "constitutes a wrongful discharge in violation of the strong public policies embodied in the laws of the United States, which encourage and require workers to report potential violations of NRC regulations." Complaint ¶ 42. However, while nuclear safety is of concern in this action it is only tangential to the action itself, that being plaintiff's claims for wrongful discharge and intentional infliction of emotional distress. Hence, the court does not believe plaintiff's action is preempted under *Pacific Gas & Electric, supra*, on the basis that the complaint concerns matters of nuclear safety regulation. Consequently, we turn our attention to defendant's second argument and Section 210 of the ERA.

## 2. Section 210

The court believes Section 210 provides plaintiff with a remedy for both of her causes of action. Her claim for wrongful discharge clearly falls within the employer conduct defined and prohibited by Section 210. Somewhat trickier is the question of whether a claim for intentional infliction of emotional distress falls within the statute's prohibition of "other discrimination." However, with the possible exception of her being removed from the laboratory under guard, all of plaintiff's allegations go to her "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 5851(a). Furthermore, although unable to recover exemplary damages, plaintiff would be compensated for any emotional damages which she may have suffered. See *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983). Hence, plaintiff's injuries as alleged in the complaint would be adequately redressed under Section 210.

In this action the question of preemption initially turns on whether Section 210 can be said to regulate nuclear safety. If it can, plaintiff's causes of action would be preempted pursuant to *Pacific Gas & Electric, supra*. The court is unconvinced, however, that Congress intended Section 210 to be a regulator of nuclear safety and therefore preemptive under *Pacific Gas & Electric, supra*.

This section, entitled "Employee protection," was designed as "an administrative procedure" to "offer[] protection to employees who believe they have been fired or discriminated against as a result of the fact that they have testified, given evidence, or brought suit . . ." under the AEA or the ERA. S. Rep. No. 848, 95th Cong., 2d Sess. 29, reprinted in 1978 U.S. Code Cong. & Ad. News 7303, 7304. Such protection was necessary since "[u]nder this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act." *Id.* As the legislative history indicates, protecting an employee's livelihood in the nuclear

industry while at the same time encouraging disclosure of potential safety hazards and violations are matters inextricably intertwined. The question, therefore, is whether by Section 210 Congress put safety or employee protection first. The court believes employee protection was the paramount congressional intent. Thus, in this instance "preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Silkwood*, 464 U.S. at 256.

Preemption, therefore, hinges on the operation of Section 210 itself. As part of this operation three aspects of the statute deserve closer inspection: (1) its applicability only to an employee who has not violated any nuclear requirement, (2) the absence of a provision for exemplary damages on behalf of an aggrieved nuclear employee, and (3) the speed with which a charge brought under Section 210 must be resolved.

Subsection (g) of Section 210 expressly states that "Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act. . . ." 42 U.S.C. § 5851 (g). Defendant argues that failure to observe the limitation imposed by Congress in subsection (g) in a state action for wrongful discharge could result in the reinstatement and compensation of a potentially dangerous employee. Plaintiff contends the limitation would be taken into account because the employee would be fired not because he voiced safety concerns but because he contributed to or caused a violation of some nuclear requirement.



The limitation imposed by subsection (g) can best be illustrated with reference to these hypothetical cases: Employee A "blows the whistle" on his employer concerning a potential safety violation. A has not violated any nuclear safety requirements. Employee B blows the whistle on his employer concerning the violation of an AEA requirement which B himself contributed to or caused. Employee C similarly blows the whistle; however, while he neither contributed to nor caused the potential safety violation which he reported he has violated a separate and distinct requirement of the AEA. Each employee may successfully show a violation of subsection (a) of Section 210.

The violation will be abated as to employee A but not B and C. A clearly falls within the language of Section 210, not having caused any violation. B has committed a safety violation, the very one which caused him to blow the whistle. Even though B is successful with respect to subsection (a) he nonetheless is barred from obtaining relief by subsection (g). This bar most clearly resembles the equitable doctrine of "clean hands" whereby relief is denied to those guilty of improper conduct in the matter as to which they seek relief. *See generally* 30 C.J.S. *Equity* § 93 (1965). In employee C's case Congress has seen fit to go even further, denying relief because he committed a violation not even remotely related to that on which he blew the whistle.

The impact of subsection (g) is therefore quite clear: even if an employer has violated subsection (a)—i.e., discharged or discriminated against an employee because he voiced concerns of nuclear safety—the employee is absolutely barred from obtaining redress if he has caused a violation of *any* nuclear safety requirement. The court is aware of no provision requiring application of the absolute bar in state court actions for wrongful discharge or intentional infliction of emotional distress arising from an employee's complaints concerning nuclear

safety. By law the state court would not be required to determine whether or not the aggrieved employee violated some requirement of the Atomic Energy Act or its amendments. Instead, the state court could end its inquiry at whether or not the employee was wrongfully discharged or discriminated against for being a whistleblower. As a result of the state action, someone like employee B or C who has violated one or more nuclear requirements would be reinstated and compensated. Subsection (g) totally eliminates such a possibility. Hence, the court believes subsection (g) of Section 210 is strong evidence of Congress' intent to preempt state actions for wrongful discharge and other discrimination with respect to nuclear whistleblowers.

Further evidence of Congress' preemptive intent lies in the absence of any provision for exemplary damages to be awarded to an employee in the event of a violation of subsection (a). The only possibility of exemplary damages would arise when the Secretary of Labor seeks civil enforcement of his order requiring the offender to abate the violation of subsection (a) and to reinstate and compensate the individual. 42 U.S.C. § 5851(d). In other similar legislation, such as the Toxic Substances Control Act and the Safe Drinking Water Act, Congress expressly provided for an award of exemplary damages "where appropriate." 15 U.S.C. § 2622(b)(2)(B); 42 U.S.C. § 300j-9(i)(2)(B)(ii). *See also* Solid Waste Disposal Act, 42 U.S.C. § 6971(b) (where Secretary of Labor finds employee has been wrongfully discharged or discriminated against he shall issue a decision "requiring the party committing such violation to take such affirmative action to abate the violation as . . . [he] deems appropriate, including, *but not limited to*, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation") (emphasis added). In the statutes upon which Section 210 is modeled, *see* S.Rep., *supra*, there are no provisions for an award of exemplary damages to an aggrieved

employee. Water Pollution Control Act, 33 U.S.C. § 1367 (b); Clean Air Act, 42 U.S.C. § 7622(b)(2)(A). Obviously, Congress has reached an informed judgment that in no circumstances should a nuclear whistler blower receive punitive damages when fired or discriminated against because of his or her safety complaints. This judgment is particularly highlighted by the instant action wherein plaintiff seeks \$2.3 billion in punitive damages.

Finally, the court is impressed with the speed with which charges brought pursuant to Section 210 must be resolved. Employees who believe a violation of Section 210(a) has occurred must file a complaint with the Secretary of Labor within thirty days after such violation occurs. From the filing of the complaint the Secretary has ninety days either to dismiss the complaint or order relief. The reason for such quick action appears to be twofold. First, if a violation has occurred the employee is restored to his position without a substantial interruption in lifestyle or livelihood. Further, he remains active in his field of expertise within the nuclear industry. Second, by requiring a speedy complaint the regulatory authorities may discover potential hazards and violations that might otherwise have gone undiscovered for an uncertain period of time. For instance, consider a nuclear facility that is able to cover up some hazard or violation for which an employee voiced internal concerns yet was fired or discriminated against. The aggrieved employee waits till the last day under the applicable state statute of limitations to file suit, normally about three years. A catastrophe could already have occurred while the employee contemplated filing an action in state court. The court does not believe this is what Congress intended and would permit to occur.

The court's review of Section 210 and its history leads it to conclude that the statute is "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to

supplement it'. . . ." *Pacific Gas & Electric*, 461 U.S. at 204. Indeed, "[a] more comprehensive statute could hardly be imagined." *Wheeler*, 108 Ill.2d at —, 485 N.E.2d at 379 (Moran and Ryan, J.J., dissenting). The court reaches its conclusions mindful of the cases discussed above. In contrast to *Silkwood*, this court is not aware of any congressional language recognizing state tort remedies for wrongful discharge and other discrimination. Furthermore, Congress has provided a federal remedy for such claims in Section 210. For these reasons this court concludes that the reliance on *Silkwood* by the courts in *Stokes* and *Wheeler* was misplaced. The latter case was decided without even the benefit of briefing or argument. The court simply is unpersuaded by these decisions.<sup>3</sup>

Based on the foregoing, the court finds that plaintiff's cause of action for wrongful discharge under state law is preempted by Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. Consequently, defendant's motion to dismiss Counts 1 and 2 of the complaint pursuant to Rule 12(b)(1), F.R.Civ.P., is granted on the ground that this court lacks jurisdiction over the subject matter. Although it appears that plaintiff's claim for intentional infliction of emotional distress also is preempted by Section 210 there remains a question as to whether the claim, if valid, may nevertheless proceed in light of the Supreme Court's holding in *Farmer v. United*

<sup>3</sup> The plaintiff has proffered an administrative decision of the Secretary of Labor which analyzes whether the voluntary dismissal of a complaint brought pursuant to Section 210 should be dismissed with or without prejudice. *Nolder v. Raymond Kaiser Engineers, Inc.*, No. 84-ERA-5 (D.O.L., June 28, 1985). The Secretary concludes that such a dismissal is without prejudice and reasons that otherwise the dismissal would preclude a plaintiff's similar claims in state court. Plaintiff argues by analogy that the Secretary would not have addressed the issue of res judicata if Section 210 were preemptive of state claims. Perhaps, but the issue of preemption was not squarely before the Secretary and for this reason the court finds *Nolder* unpersuasive.



*Brotherhood of Carpenters & Joiners of America*, 430 U.S. 290 (1977). This question will be addressed in section III, *infra*.

Even if the court did not hold that plaintiff's claim for wrongful discharge is preempted by Section 210 of the Energy Reorganization Act, the court would be constrained nevertheless to hold that plaintiff has failed to state a cause of action for wrongful discharge in light of the Fourth Circuit Court of Appeals' decision in *Guy v. Travenol Laboratories, Inc.*, 812 F.2d 911 (4th Cir. 1987). The plaintiff in *Guy* alleged that he was fired from his supervisory position at the defendant's North Carolina drug manufacturing plant after refusing to falsify certain records pertaining to the quality and quantity of pharmaceuticals that drug manufacturers are required to keep under the Food and Drug Administration's regulations, falsification of which would have subjected him to criminal sanctions. After analyzing the law concerning employment at will in North Carolina the Court of Appeals concluded that "[an] employer may terminate any employee for any reason unless the employee has a specific duration contract, gave some additional consideration for permanent employment, or lost his job for refusing to give perjured testimony." *Guy*, 812 F.2d at 915. The court held that plaintiff Guy's complaint did not come within any of the stated exceptions and therefore failed to state a cause of action under North Carolina law.

In this instance plaintiff alleges her discharge from GE was wrongful in that it violated "the strong public policies embodied in the laws of the United States, which encourage and require safe operation of nuclear facilities and require workers to report potential violations of NRC regulations." Complaint ¶ 42. Plaintiff, however, has not alleged either the existence of a specific duration contract, the giving of some additional consideration, or a discharge for refusing to give perjured testimony. Despite

plaintiff's persistent arguments to the contrary, this court may not disregard the pronouncements of the Fourth Circuit when they are not distinguishable. *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975); *Spell v. McDaniel*, 591 F.Supp. 1090, 1098 (E.D.N.C. 1984).

Furthermore, the court is not convinced that plaintiff was under any legal duty to report potential safety violations. Plaintiff relies on 10 C.F.R. Parts 19 and 21 and 42 U.S.C. § 2273 for the proposition that plaintiff could have been subjected to severe criminal sanctions for failure to report potential safety violations. The court has thoroughly reviewed the regulations and statute asserted by plaintiff as imposing a legal duty and is unable to conclude that any such duty is or was imposed. See *Radiation Technology, Inc.*, 8 N.R.C. 655, 658, 668-69 (1978); 42 Fed.Reg. 28891, 28892 (1977); 38 Fed.Reg. 22217 (1973).

Based on the foregoing the court finds that plaintiff has also failed to state a cause of action for wrongful discharge in violation of the laws of North Carolina. Consequently, the court will grant defendant's motion pursuant to Rule 12(b)(6) to dismiss plaintiff's claim for wrongful discharge on the alternative ground that plaintiff has failed to state a claim upon which relief can be granted.

### III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Despite having concluded that plaintiff's cause of action for intentional infliction of emotional distress should be preempted, there remains the possibility that the claim, if valid, may proceed in light of *Farmer v. United Brotherhood of Carpenters & Joiners*, *supra*, which will be summarized later. First, we examine the validity of the cause of action as alleged.

In a recent decision the North Carolina Court of Appeals addressed a claim for intentional infliction of emotional distress in an employment context on a motion to dismiss. *Dixon v. Stuart*, 85 N.C.App. 338, 354 S.E.2d 757 (1987). In *Dixon* the plaintiff sued the City of Winston-Salem, North Carolina and several of its agents and employees, seeking compensatory and punitive damages for loss of employment opportunities, injured professional standing, emotional and physical illness resulting in permanent injury, and suffering of humiliation and embarrassment. The plaintiff alleged (1) that the individual defendants unlawfully conspired to hinder, obstruct and injure his career advancement with the City of Winston-Salem and to induce the City not to promote plaintiff by, inter alia, ridiculing and harassing the plaintiff in the workplace and (2) that the defendant's acts (a) were willful and malicious; (b) caused the plaintiff humiliation and embarrassment in the workplace; (c) were extreme and outrageous; (d) caused plaintiff to suffer humiliation, embarrassment, loss of professional status, physical illness and severe and extreme mental distress. *Dixon*, 85 N.C.App. at 338-39, 354 S.E.2d at 758. The trial court granted the defendant's motion to dismiss the action pursuant to Rule 12(b)(6) of the North Carolina Rules of Procedure on the ground that the complaint failed to state a claim upon which relief could be granted.

The Court of Appeals reversed the lower court's decision. In that decision Chief Judge Hedrick focused on plaintiff's allegations regarding ridicule and harassment in the workplace and that the defendant's acts intended to cause and actually did cause plaintiff to suffer extreme emotional distress. The court held:

We cannot say that it appears beyond doubt that plaintiff can prove no set of facts in support of these allegations which would entitle him to relief from these defendants for intentional infliction of emotional distress. Extreme and outrageous ridiculing

and harassing has been grounds for recovery under this tort before. See, e.g., *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986); *Woodruff v. Miller*, 64 N.C.App. 364, 307 S.E.2d 176 (1983).

*Id.* at 341, 354 S.E.2d at 759.

Pursuant to *Dixon* this court believes plaintiff has stated a valid cause of action for intentional infliction of emotional distress. Plaintiff alleges that the acts on the part of GE's management were intended and did in fact cause plaintiff to suffer severe emotional distress. With respect to "extreme and outrageous" conduct plaintiff alleges that GE's management (1) removed her from her job in the Chemet Lab under guard as if she were a criminal, exposing her to contempt and ridicule; (2) assigned her to a degrading "make work" job; (3) derided her as paranoid; (4) barred her from employment in controlled areas; (5) subjected her to constant surveillance in the workplace; (6) isolated her from fellow workers and did not even permit her to eat in the company lunchroom with her fellow workers; and (7) conspired to fraudulently charge her with violations of safety and criminal statutes. Although defendant GE vehemently contends and argues that plaintiff has failed to state a claim, it neglected in its reply brief to address and attempt to distinguish, if possible, the *Dixon* decision. The court, however, believes that under *Dixon* plaintiff has stated a valid claim for intentional infliction of emotional distress. Therefore, defendant's motion to dismiss Counts 3 and 4 of the complaint pursuant to Rule 12(b)(6), F.R.Civ.P., cannot be granted.

Although plaintiff has stated a valid cause of action for intentional infliction of emotional distress there remains, however, the issue of whether the claim may proceed despite the apparent preemptive effect of Section 210, 42



U.S.C. § 5851, in light of the Supreme Court's decision in *Farmer v. United Brotherhood of Carpenters & Joiners, supra*. In *Farmer* the plaintiff, a union member, had brought a state court action against the union alleging that the union had discriminated against him in hiring hall referrals and had intentionally inflicted emotional distress on him through a campaign of public ridicule and incessant verbal abuse. All of the plaintiff's claims were held preempted by the National Labor Relations Act (NLRA) except a potential emotional distress claim. The basis of the Court's holding was that there was no federal protection offered by the NLRA against a union's outrageous conduct. *Farmer*, 430 U.S. at 302. Instead the focus of a National Labor Relations Board proceeding would solely concern whether the defendant union discriminated against the plaintiff and whether a cease and desist order and back pay were proper. It has been held that *Farmer* created a "narrow exception to federal preemption." *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

In this action, plaintiff has a federal remedy in Section 210. That section specifically addresses "other discrimination" and provides for compensatory damages in the case of a violation. With the possible exception of being removed from the Chemet Lab under guard, all of plaintiff's allegations concern "terms, conditions, or privileges of employment." 42 U.S.C. § 5851(a). Being removed under guard would not in and of itself support a cause of action for intentional infliction of emotional distress. Hence, the court believes plaintiff's claims regarding emotional distress should be presented to the Secretary of Labor pursuant to Section 210. See *Olguin v. Inspiration Consolidated Copper Company*, 740 F.2d 1468, 1475-76 (9th Cir. 1984).

Based on the foregoing the court finds that plaintiff's cause of action for intentional infliction of emotional dis-

tress is preempted by 42 U.S.C. § 5851. Consequently, defendant's motion to dismiss Counts 3 and 4 of the instant complaint pursuant to Rule 12(b)(1), F.R.Civ.P., on the ground that this court lacks jurisdiction over the subject matter will be granted.

#### IV. SUMMARY

To summarize, defendant's motion to dismiss is granted as to counts 1 and 2 of the complaint pursuant to Rule 12(b)(1) on the ground that the court lacks jurisdiction over the subject matter and on the alternative ground pursuant to Rule 12(b)(6), F.R.Civ.P., that plaintiff has not stated a claim upon which relief can be granted. While defendant's motion pursuant to Rule 12(b)(6) to dismiss Counts 3 and 4 of the complaint, alleging a claim for intentional infliction of emotional distress and punitive damages is not well taken, these counts are dismissed pursuant to Rule 12(b)(1) on the ground that the court lacks subject matter jurisdiction. The action is therefore dismissed in its entirety, and the clerk of court is directed to enter judgment accordingly.

SO ORDERED.

/s/ F. T. Dupree Jr.  
F. T. DUPREE, JR.  
United States District Judge

February 10, 1988.

U.S. DEPARTMENT OF LABOR  
Office of Administrative Law Judges  
211 Main Street  
San Francisco, California 94105  
Suite 600

(415) 974-0514  
FTS 8 454-0514

Case No. 85-ERA-00002

IN THE MATTER OF VERA M. ENGLISH

v.

GENERAL ELECTRIC COMPANY

Mozart G. Ratner, Esq.  
1900 M Street, N.W.  
Suite 610  
Washington, D.C. 20036

Arthur M. Schiller, Esq.  
1000 Connecticut Ave., N.W.  
Suite 1205  
Washington, D.C. 20036  
For the Complainant

William W. Sturges, Esq.  
Weinstein, Sturges, Odom, Groves,  
Bigger, Jonas & Campbell, P.A.  
810 Baxter Street  
Charlotte, N.C. 28202

Scott A. Klion, Esq.  
General Electric Company  
175 Curtner Ave. M/C 822  
San Jose, CA 95125  
For the Respondent

Before: ROBERT J. BRISENDEN  
Administrative Law Judge

## DECISION AND ORDER

This is a proceeding under the Energy and Reorganization Act of 1974, as amended, (hereinafter referred to as the "Act"), 42 U.S.C. § 5851, and its implementing regulations, 29 C.F.R. Part 24.

The Complainant Vera English filed a complaint with the United States Department of Labor, under 29 C.F.R. § 24.3, on August 24, 1984, and an amended complaint on August 27, 1984. Her Complaint alleged discrimination as a result of the initiation of and the participation in Nuclear Regulatory Commission (hereinafter NRC) investigations of facilities at the Respondent General Electric Company (hereinafter GE) plant located in Wilmington, North Carolina. On October 2, 1984, following an investigation, the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, concluded that English had been discriminated against as defined and prohibited by the Act and 29 C.F.R. § 24.4. The decision of the said Administrator was appealed by both Complainant and the Respondent.

A formal hearing was held in Wilmington, North Carolina, from December 17 to December 19, 1984, and a second session of the hearing was held on March 19 to March 28, 1985, at which times the parties were afforded full opportunity to present evidence and argument. The findings and conclusions in this decision are based upon my observation of the witnesses who testified at both sessions of the hearing, upon an analysis of the entire record, arguments of the parties (both oral and written), applicable regulations, statutes, and case law precedent. By agreement of the parties, time constraints applicable to this case were waived.<sup>1</sup> On April 5, 1985, an Order

<sup>1</sup> Shortly after the first session of the hearing, the parties had waived the time constraints of 29 C.F.R. § 24.6, because of the necessity of having the hearings continued into a second session. Additionally, in order to allow time for the submission of post-



was issued setting the court's time limits on the submission of briefs and proposed findings of fact, Fee and Cost Petition, and the response by GE to said petition. The Order also clearly indicated that the record, for the submission of evidentiary documents or any other documents, was closed. On June 27, 1985, because said order had been ignored, as was evidenced by numerous documents mailed in to the judge's San Francisco office, another Order was issued advising the parties that any documents submitted which were in contravention of the April 5, 1985, Order would not be considered. Accordingly, Respondent's Motion to Strike a Portion of Complainant's Brief is granted and no documents or material submitted post-hearing is considered part of the evidentiary record.

#### *Statement of the Case*

Vera English was an employee of GE from November 13, 1972 to July 30, 1984. During the times relevant to this case, Mrs. English worked in the Chemet Laboratory.<sup>2</sup>

On March 5, 1984, Mrs. English was an hourly worker in said laboratory. At that time, she was working on the shift known as the "B" shift. In that particular week, she started working Sunday from 7:00 a.m. to 3:10 p.m. She worked the same hours on the fifth, sixth and seventh and eighth of March. She then switched to a different shift, on Friday. This was her normal routine during that month. Her shift Friday evening, started at 11:00 p.m. and went on to 7:30 a.m., a shift commonly

---

hearing briefs, the parties have agreed to waive the requirements of 29 C.F.R. § 24.6(a) and 24.6(b).

<sup>2</sup> Many of the allegations and contentions of both parties were too far removed in time to have any significant relevance to this case. Accordingly, although Mrs. English worked in the Chemet Lab for twelve years, other than for taking cognizance of Complainant being an experienced laboratory worker, under the provisions of 29 C.F.R. § 24.5(e)(1), the time frame was limited by this judge to 1982 to 1984.

referred to as a "graveyard" shift. She had no immediate supervisor to bring complaints to until the following Sunday evening, when a William Lacewell came on duty. It was in the week prior to that Sunday, starting with Monday, March 5, 1984, that events occurred which had great bearing on her removal by management from the Chemet Lab and the eventual termination of her employment with GE.

The Chemet Lab included what were known as "controlled areas".<sup>3</sup> Mrs. English had made complaints to the NRC and to GE management in years prior to the March 1984 period of time, but the parties were limited to the time frame above-mentioned (see footnote 2, *supra.*). Mrs. English had contacted the NRC on August 29, 1982 and on February 13, 1984. Investigations into her allegations were conducted by the NRC on September 7-10, 1982, and March 26-29, 1984. The same February 13th

---

<sup>3</sup> The Chemet Lab is a part of a large building within the GE facility in Wilmington, North Carolina. There are various laboratories within the Chemet Lab.

The plant is involved in the production of fuel bundles of uranium material, and said "bundles" are intended for use at reactor sites for the production of electric power. Additionally, uranium powder is produced, primarily for sale to overseas customers. The Chemet Lab had areas calling for certain precautions, i.e., controlled areas. Persons leaving a controlled area must use a monitor or frisker, which is a hand held unit used to check for radiation contamination on any part of the body, including hands, feet, face and clothing. Another precaution taken, within the lab, are hoods with fans to pull off airborne contamination away from an individual who is working under that hood. Within the controlled or "semi-controlled" areas the lab workers must wear gloves, a lab coat and safety glasses. These workers work both with powder and liquid solutions of uranium. There are marble tables with marble legs for use by the lab workers. The marble material is not affected by vibrations and is easier to clean than other material. Safety rules require that any spillage of uranium powder or uranium liquid be brushed or cleaned off from time to time during the work hours, and especially before leaving the work shift.



allegations were brought to the attention of GE management in a written report by Complainant, dated February 21, 1984. An examination and investigation of conditions, upon which Mrs. English's complaints were based, was conducted by GE on March 8-21 and March 26-30, 1984. GE's Quality Assurance Review report, dated April 26, 1984, revealed that several of Mrs. English's accusations of violations of company practice and procedure had substance. A prior GE Chemet Lab Safety Review report (dated March 29, 1984), concluded that safety procedures and conditions in the lab were adequate. With reference to the same allegations, NRC concluded that they were unsubstantiated.

Claimant's work in the Chemet Lab consisted of quality control duties, in which samples of uranium powder are weighed, oxidized, weighed again, dissolved in nitric acid and finally weighed again. The analyst is then able to determine the concentration of uranium in a given sample to ascertain whether the proper "mix" has been accomplished. On Monday, March 5, 1984, Mrs. English was in the process of weighing a sample when she found contamination left by the prior shift. This occurred again in the following three days. Mrs. English testified that the nature and amount of contamination required her to do considerable work to clean it up before she could start on her own work. She believed that the male workers, who worked the shift just prior to hers, were careless and sloppy in their work. She felt that they depended on her to clean up. According to Mrs. English, the contamination was quite visible to anyone. It was on her work surface and on a nearby microwave oven, a piece of equipment used by her and the workers on the prior shift. Additionally, she found uranyl liquid contamination (producing a yellow stain) on two legs of her work table. She cleaned all of this up for several days, then on Thursday or Friday, she again found new stains and contamination elsewhere. On this occasion, knowing that there was no supervisor present until Sunday, she

stated that she put red tape around the stain on the table legs so that she would be able to point it out to her supervisor, Bill Lacewell. Her purpose was also to indicate the areas of contamination as a warning to fellow workers. She testified that she purposely left the contamination, outlined by red tape, so as to prove to management that her co-workers were extremely lax in their performance of clean-up duties. Some of her prior complaints, in her view, had received little attention since she was thought to have insufficient proof of malfeasance by other employees. She felt that this was because she always promptly cleaned up visible contamination, therefore she had nothing tangible to show management to back her accusations.

She recalled that the red tape and the contamination was still there on Saturday and Sunday. Sunday evening, the first night after Thursday, that a regular supervisor was on duty, the Complainant promptly discussed the matter with supervisor Lacewell. Mrs. English was firm in her contention that she had not deliberately contaminated any part of her work station, and that she had cleaned the contamination left by others. With the exception of the portion of contamination outlined by red tape, all had been cleaned. She admitted she intentionally left said contamination for the purposes heretofore mentioned. She stated that she, at that time, trusted Mr. Lacewell more than other management personnel. She had on numerous occasions brought up the problems of the defective microwave oven, the workers not using the "friskers" on leaving controlled areas, and the constant failure to clean up contamination at her work station, but management, according to her, did not show serious concern on these subjects. Mrs. English was of the opinion that management's main concern was keeping up production so that safety was sacrificed, and accordingly her superiors did not appreciate her pointing out unsafe practices of fellow workers. She strongly

felt that such practices endangered her health and the health of others.

In her reporting on her concerns that Sunday evening, she pointed out the contaminated table legs outlined by red tape.<sup>4</sup> She advised Lacewell, at that time, that she did not intend to keep cleaning up for other people. She also related her concerns on what had occurred in the prior week, including the microwave defect that allowed leaks and fumes strong enough to give her a headache. She asked permission of Lacewell to use the "frisker" (personal survive device) to check out certain areas of her work station. Lacewell granted this request.

To some extent, Lacewell, in his testimony corroborated Complainant's story with reference to the microwave oven, her mention of the red tape and expression of her concern over other employees' spillage. However, he denied that she pointed out the contamination surrounded by red tape, or seeing the red tape.

Subsequent to the above events there was a correction of the microwave defect, and an inspection and cleaning of the area by GE personnel. All of which necessitated work stoppage in the affected areas of the laboratory. Additionally, as a consequence of Mrs. English's March 1984 complaints (made to NRC and GE), a series of communications, both written and oral, between management and Mrs. English began. Various meetings were held, some with Mrs. English present and some without her presence. Certain charges were set out in a letter dated March 15, 1984, which included:

1. the unauthorized removal of the personal survey instrument from the entrance to the laboratory;

<sup>4</sup> There was a dispute by management as to the use of red tape to designate a "hot" area. Some of the documents that Claimant relied on were ambiguous and confusing with reference to the use of red tape. Management claimed that red tape was to designate areas of storage of uranium products rather than to designate areas where spills had occurred.

2. the deliberate contamination of a table;
3. failure to clean up contamination, knowing it existed;
4. the continued distraction of other laboratory employees; and
5. disruption of normal laboratory activities.

Mrs. English appealed said charges, and during the company appeal process, it was finally determined that the "frisker" removal had been authorized. As to charges No. 2 and No. 3, GE's witnesses did not seem in total agreement as to whether said charges had merit or not. All but No. 3 were dropped or at least it was decided that no action would be taken in regard to same. Action was taken on the No. 3 infraction.

The punishment dealt to Mrs. English for "failure to clean up contamination, knowing it existed" was removal from the Chemet Lab and assignment to some rather menial work in the Building "J" Central Stores warehouse. Complainant testified that a man was assigned to watch her constantly and that she was humiliated in an incident concerning her shoes. At some time subsequent, Complainant was advised that she would have to "bid" for an open position, that she qualified for within the GE plant, provided that it was not one within the Chemet Lab. A time limit was set and, there apparently existing no such positions, she was involuntarily placed on a "lack of suitable work" status. There is nothing in the record to show that any "suitable" work position was ever offered to Complainant. Further, the record is devoid of any rebuttal evidence to Mrs. English's charge that she was the only person ever removed from the Chemet Lab for failure to clean up contamination. She was credible in her testimony that other workers had caused the contamination and there was no evidence to the contrary. Further, the evidence clearly shows, without contradiction, that at least one shift and possibly



two (not counting her shift) failed to clean up visible contamination. The area of contamination was outlined with red tape, whether such method was considered proper for dealing with the situation or not, the red tape added to the visibility of the contamination. Yet, no one using the same work table, in other shifts, bothered to report this nor to clean it up.

Testimony by GE management made it quite obvious that the sheer number of the complaints made by Mrs. English to NRC (and to management) brought about a cessation of work due to the GE's investigation and meetings and the concomitant NRC investigations. The latter investigations resulted in a rather mixed series of findings.<sup>5</sup>

The annoyance caused by Mrs. English's allegations, whether justified in management's eyes or not, coupled by the embarrassment and involvement of much of GE's management personnel with the NRC investigations, ap-

---

<sup>5</sup> The severity level of violations for an NRC licensee, such as the GE Company, are graded from one to five. The larger the number, the less severe the violation. Severity levels I and II involve very significant violations; level III violations are significant; level IV violations are significant if left uncorrected; and level V violations are of minor concern.

Following the above discussed allegations, which were reported to and investigated by both GE and the NRC, Mrs. English filed additional allegations with the NRC in May and June of 1984. The latter complaints were not reported to GE, though GE learned of them through NRC investigations. A number of the May and June allegations were merely reiterations of the previously filed complaints. Of the 35 allegations investigated, five were found to be Severity level IV violations; one (failure of personnel to use personal survey devices) was determined to be a corrected prior violation; seven were partially or wholly substantiated, but were not deemed violations of NRC regulations or license requirements; one was unresolved; and two were not addressed. Three level IV violations and one level V violation were found to exist on the basis of independent NRC determinations. (See ALJ Exhibits 5-12, incl.; Employer's Exh. 11)

pears to have culminated around the March to May 1984 period, although NRC investigations continued during September, November and December of 1984 and January and March of 1985.

Mrs. English testified as to some rather bizarre series of break-ins into her home, corroborated in part by police testimony. Insufficient proof was presented to tie in GE employees.

Complainant called a psychologist, Dr. Peter Boyle, who testified that he was of the opinion that the actions of management, as related by Mrs. English to him, brought about a depressed and fearful emotional state. He reached this opinion after lengthy interviews and the administration of tests that included standard intelligence tests, multiphasic personality inventory and the Rohrschak ink blot test. He also reviewed her medical records and discussed with her the impact of the various actions taken against her by GE, during her final years of employment. He determined that Mrs. English was candid in her reports of her symptomology, and that she was neither paranoid nor suicidal. His diagnosis of her condition was that she was suffering from a severe adjustment reaction coupled with mixed emotional features, namely depression and "anger" (clinically termed "agitated depression"), all associated with stress resulting from her work situation. Specifically, her emotional problems are a cumulative effect of various stressful occurrences that Mrs. English experienced during her employment with Respondent. Dr. Boyle's prognosis was that the condition is treatable with supportive psychotherapy, including medication. He opined that Complainant should continue treatment once a week for at least six months. A Dr. Bill Knox, M.D., has been treating her on referral from Dr. Boyle.

Unfortunately, nothing was elicited on the cost of such treatment from Dr. Boyle.



### Discussion of Issues

The ultimate issue in this case, is whether the Respondent discriminated against Vera English due to her engaging in "protected activities". Such activities, in the instant case, being the initiating of and cooperating with the investigations of NRC.

In order for a Complainant to prevail on a discrimination claim under the Energy Reorganization Act, 42 U.S.C. § 5851 (hereinafter ERA), the Complainant must prove that: (1) the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment; and (3) that the alleged discrimination arose because the employee participated in an NRC proceeding. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). Once the employee shows that an illegal motive played some role in the discriminatory act(s), the burden shifts to the employer to prove that he would have discharged or taken whatever discriminatory action was proven, even if the protected activity did not occur. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). She also *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983).

It was conceded that GE was an employer subject to the ERA. The banishment from the Chemet Lab and the subsequent discharge (for that is what it amounted to, regardless of the euphemism used by Respondent), clearly affected Mrs. English's terms, conditions and privileges of employment; and on her discharge date, the effect was total on her compensation.

The disciplinary actions of Mrs. English's employer coincided, in time, with her strongest worded complaints in March of 1985, and the meetings and communications, prior to the banishment from the laboratory, concerned

the subject of her actions in attempting to correct what she considered violations of NRC requirements.

There is little doubt that this lady was a difficult employee to handle, that she disrupted work activity at times, and that some of the time her complaints had only minor merit. Nevertheless, it also appears true that many of her complaints had a proper basis in fact, and that her concern for her own safety and the safety of fellow employee was a strong factor in her allegations.

The gist of Respondent's chief defense to the substantive charges was that Mrs. English was a high strung, nervous woman with marked and emotional reactions to practices that were not within her perfectionist's point of view. To bolster this defense theory, a somewhat selective chart of charges made to the NRC and the NRC findings was presented by Respondent. The contention was that the majority of complaints resulted in findings of "no merit" or, at most, a minimal violation. A review of the NRC Findings does not indicate such an innocuous conclusion with reference to GE's record with the NRC. This "scorecard", however, has little to do with the central issue. Unique or important information is not required. The need to protect channels of information from being dried up by Employer intimidation is the purpose of the Act, not the disclosure of particular types of information, *DeFord v. Secretary of Labor*, *supra*. Nevertheless, Respondent would have a valid defense if it had proven sufficient justification for the disciplinary actions taken, *apart from Complainant's participation in protected activity*.

On the last day of the hearing Mrs. English became overwrought and indulged in an outburst which lasted several minutes, the subject of which was the frustration that she felt over her employer's refusal to give credence over her concerns on hazardous practices. From the defense point of view such an emotional response to cross-examination tended to support the contention that Com-

plainant was an unusually excitable individual, therefore her disruption of the lab and its workers gave Employer reason to remove her. On the other hand, considering the unrefuted testimony of the psychologist, this behavior, at the end of a long trial, could reasonably be interpreted as symptomatic of the emotional state which had resulted from Employer's discriminatory actions.

Additionally, Respondent urges that the banishment from the Chemet Lab and the subsequent discharge was wholly justified by Mrs. English's serious infraction of the "failure to clean up visible contamination" rule. GE's management witnesses testified that they considered such actions as a means of entrapment of Radiation Safety Inspectors for the company. Management felt a concern as to the lengths that Complainant would go to in promoting her views on safety practices, and therefore considered her a threat to other employees' safety. While this may be logical, if management's view of her personality is accepted, this expressed concern with safety is belied by Respondent's inertia in regard repeated violations of safety rules by other employees. One example of this being the failure to investigate why the uranyl stain was not cleaned up by any other party prior to the Monday following Complainant's report to Lacewell.

Employer's burden requires that it prove an affirmative defense, i.e., it has the burden of persuasion. *Mt. Healthy v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471. In dual motive cases, the employer bears the risk that the legal and illegal motives cannot be separated. An effort must be made to sort out these motives. The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence. *Mackowiak, supra*. at 1162 and 1164.

In the instant case, Respondent's witnesses were not believable in attributing the discipline imposed on: (1) regards for other employees safety which was ostensibly endangered by Mrs. English's actions and complaints and

(2) for the "deliberate" violation of the clean-up rule. When the whole of the evidence is considered, there appears no adequate explanation as to why:

(a) no investigation was made concerning other employees, including management, failing to clean up visible contamination;

(b) such employees, if known (and logically, at least some *were* known) were not punished or admonished in any way; and

(c) the infraction of failure to use personal survey devices was so lightly regarded with reference to punishment vis a vis failure to clean up visible contamination.<sup>6</sup>

Additionally, the coincidence of a series of allegations by Mrs. English culminating in the March 1984 serious charges and various meetings directly connected with the March complaints with the banishment from the Chemet Lab is a factor that carries considerable weight. Further, the meetings, as testified through management's witnesses, came across as inquisitions to find charges that would "stick", not a true investigation into the validity of concerns over general laboratory safety. Mr. Lacewell was concerned about "entrapment" of Radiation Safety personnel and Mr. Sheely about "flagrant violation of work rules"; neither supervisor, as far as can be ascertained from the record, made any great effort to properly investigate Mrs. English's complaints on safety. The one rule that Mrs. English technically violated, it may therefore be inferred, was a pretext for getting rid of an employee who would not stop reporting violations to NRC. Notices at the plant and other information which Mrs. English understood as citing her duty to report violations, were apparently accepted by her at face value. Nothing in the record, briefs or in my research indicates that the

<sup>6</sup> Even taking into account the level V vs. level IV NRC designations, a five day suspension appears to have been the heaviest punishment dealt to anyone.



number and frequency of reports of violations to NRC excuses discipline against the employee reporting. Indeed, all violations are to be reported along with the employer's failure to take adequate corrective action.

*Defense Motions to Dismiss and/or For Summary Judgment:*

The motions are based on ERA sections 210(g) and 210(b).

The motion on timeliness was previously denied on November 1, 1984, with permission to bring it again after the close of the hearing.<sup>7</sup>

Section 210(g) of the ERA, 42 U.S.C.A. § 5851(g) provides:

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended (42 U.S.C.A. § 2011, *et seq.*)

There was no evidence introduced to indicate that the failure to clean up a spill of uranyl would constitute a violation of any portion of the Atomic Energy Act. However, such a failure to act was considered a violation by NRC, and therefore could be considered a "requirement" as called for in the above statute. Assuming that such is the case, I do not consider that Mrs. English deliberately caused a violation under the circumstances of this case. Respondent contends on one hand, that Mrs. English's only recourse with regard to discovered violations was to report them to management, which she did to no avail, or to the NRC. On the other hand, Respondent would have Mrs. English continue to abate violations caused by others—namely, to clean up contamination

<sup>7</sup> Said Ruling and Order is incorporated herein by reference.

left by employees on prior shifts in violation of NRC requirements. GE cannot have it both ways. I find Mrs. English's statement credible that she had not caused the uranyl stain on her work table. Her outlining of the results of some other person's negligence and failure to clean up was in effect, at the same time, a notice to management and a warning to fellow workers of the visible contamination. Since Mrs. English had many times in the past cleaned up contamination caused by other persons in their preceding shifts, she was entitled to expect that someone other than she would clean up or call attention to the uranyl stain. Further, I found her credible in her testimony that she brought the stain and red tape to the attention of her immediate supervisor, Mr. Lacewell, as soon as he was available to observe the same first hand. Once the matter was brought to attention of management, an order should have issued to clean the stain. At least the Radiation Safety men should have been called in to view the situation. Mrs. English, as heretofore stated, knew that she could expect no credence to her complaints without tangible evidence. In demonstrating the malfeasance of others, she took the only means available to provide visible proof to support her past and immediate allegations. Her demonstration of same was used as a pretext for retaliatory action, and by way of Respondent's motion it is also used as a basis to defeat her claim. To allow the latter would be patently unfair and defeat the purpose of the Act. This was not an act done deliberately to invoke "whistle blower" protection, rather it was a means of reporting violations, albeit unorthodox. See S.Rep. No. 848, 95th Cong., 2d Sess. 30, reprinted in 1978 U.S. Code Cong. & Ad. News 7303, 7304; *Hochstadt v. Worcester Foundation For Experimental Biology*, 545 F.2d 222 (1st Cir. 1976).<sup>8</sup>

<sup>8</sup> In determining whether Claimant's conduct afforded an independent, nondiscriminatory basis for discharge, or whether it was protected activity, the court must determine whether Claimant's overall conduct was so generally inimical to Employer's interests



The motion based on section 210(g) is denied.

With respect to the defense motion under section 210(b), I find that Mrs. English's complaint was timely filed. Section 210(a) provides in pertinent part that "no employer. . . may discharge any employee or otherwise discriminate against any employee with respect to his. . . employment. . ." 42 U.S.C. § 5851(a). Section 210(b) provides that "any employee who believes that he has been discharged or otherwise discriminated against. . . may, within thirty days after such violation occurs, file. . . a complaint with the Secretary of Labor. . . alleging such discharge or discrimination." 42 U.S.C. § 5851(b).

Mrs. English alleged in her complaint continuing acts of discrimination by GE, as a result of her protected activities, from December 15, 1983, culminating in her transfer out of the Chemet Lab on March 15, 1984, and her discharge on July 30, 1984. GE contends that the thirty-day statute of limitations began to run on May 15, 1984. By letter of that date, Mrs. English was notified that as a result of her intentional failure to clean up contamination she would not be allowed to return to work in controlled areas, that her temporary reassignment would be extended for ninety days beginning May 1, 1984, that open placement positions would be reviewed in an effort to find suitable work for her, and that, in the event that she failed to secure permanent placement by July 30, 1984, she would be "involuntarily placed on lack of suitable work" status. Mrs. English alleges that GE's purported effort to find suitable work for her was merely another pretext in its efforts to remove her from the company.

---

and so excessive as to be beyond the protection of the statute. The court must balance the setting in which the activity arises and the interests and motivations of both Employer and Employee. *Hockstadt, ibid.* at pages 229, 230 and 232.

GE's reliance on the cases of *Chardon v. Fernandez*, 454 U.S. 6 (1981) and *Delaware State College v. Ricks*, 448 U.S. 250 (1980) is misplaced. Those cases involved racial discrimination in the denial of tenure. In each of these cases, the complainant was denied tenure and given a one-year "terminal" contract. The court held that the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful. *Ricks*, 449 U.S. at 258; *Chardon*, 454 U.S. at 8. In said cases the fact of termination was not in itself an illegal act. Furthermore, neither complainant alleged any illegal acts subsequent to the date on which the decisions to terminate were made. In the instant matter, the statute specifies that discharge is one event upon which a complaint may be predicated, and is thus an illegal act in itself. Additionally, Mrs. English has established a continuing violation; "a series of related acts, one or more of which falls within the limitations period." *Valentino v. U.S. Postal Service*, 674 F.2d 56, 65 (D.C. Cir. 1982).

Mrs. English, therefore, did not need to file shortly after the first of the discriminatory acts, nor at any time prior to the discharge. If this were not so, an Employer could easily circumvent the statute by minor acts of discipline, followed by a discharge timed beyond the requisite time limit.

GE's motion, on both grounds, is denied.

Based on the foregoing discussion and the ruling on the motion, I make the following findings:

1. GE was an employer subject to the ERA (Act).
2. The Respondent employer discriminated against Complainant, by:
  - (a) banishing her from the Chemet Lab, and
  - (b) discharge from employment with GE

3. Said discrimination was motivated by Complainant's initiation of and participation in NRC proceedings investigating Employer's facility, specifically the Chemet Laboratory.

4. Respondent did not carry its burden to prove that the above discriminatory acts would have taken place, even if the protected activity of this Complainant had not taken place; i.e., the charge of "failure to clean up visible contamination" was a pretext.

5. Complainant, through her testimony and that of her witnesses (including psychologist Boyle) adequately established causal connection and the basis for compensatory damages and other relief provided by section 5851 of the Act.

6. The evidence of record considered for No. 5 finding sufficed without the necessity of evidence by an economist.

It is concluded that Complainant established a case of discrimination against Respondent, and in that regard the decision of the Administrator of the Wage and Hour Division is affirmed. With reference to the relief to be afforded, I have followed the guidelines of *DeFord, supra*. Accordingly, I must order the reinstatement of Mrs. English's former position since that is what the statute, as interpreted by the *DeFord* court, clearly sets forth. The balance, of the relief provided, also has been kept strictly to the bounds of the remedies outlined in the statute. *DeFord, supra*, at page 289.

#### *Attorneys' Fees and Costs*

The express statutory provision for Complainant's attorney fees is as follows in the ERA:

If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all

costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order is issued. 42 U.S.C. § 5851(b)(2)(B).

Complainant's attorneys have filed petition for fees and costs along with numerous supporting documents. The total of attorneys' fees and expenses claimed is \$543,660.95. Respondent filed a Memorandum in Opposition to said petition.

The determination on whether the items listed were "reasonably incurred" requires a logical starting point. Two cases, frequently cited in attorney fee matters, have been used to provide the outline for this subject.

In the *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973) the "lodestar" approach was set forth. Under this analysis the number of hours spent and the manner that they were spent is first considered; next the reasonable hourly rate is fixed, considering the attorney's reputation and status (contingency aspects and quality may increase or decrease the "lodestar", which is the figure for hours times hourly rate). In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), a race discrimination case, twelve factors were recited:

- (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill necessary to perform the legal services properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional rela-



tions with the client; and (12) awards of similar cases.

Counsel for Respondent, in his memorandum suggested categories for the items of work to facilitate determining whether the hours were reasonably spent. I have kept this in mind. In *Copeland v. Marshall*, 641 F.2d 880, the court was upheld on the use of the "lodestar" approach, with a reduction of hours which were non-productive. In deciding which hours to reduce (and in some instances, the eliminating of total hours for certain items) I have carefully reviewed the *New York Gaslight Club v. Carey*, 100 S.Ct. 2024 (1980) and the later *Webb v. Board of Education of Dyer County*, 105 S.Ct. 1923 (1985). I consider the latter case as more pertinent to the case at hand. I incorporate by reference the reasoning of the *Webb* case in the following discussion.

As stated by the Sixth Circuit court in *DeFord, supra.*, a section 5851(a) case is a simple one requiring the Complainant to prove three elements (see page 8 of this decision). This case was not one that required hearings on interlocutory rulings of this administrative law judge in the U.S. District Court for D.C. or in the Court of Appeals for the D.C. Circuit. Such hours are deleted from consideration. Time spent in challenging the NRC determination was eliminated. Those items which lack specificity were not considered. It was not important that NRC find merit in each of Mrs. English's complaints, nor was the mode of NRC investigation material to this case (see Discussion, this Decision). The words "legal research" are assumed to relate to the subjects listed for the same date. I had the choice of eliminating all such references for being non-specific or making the above assumption; where there appears no reason to research the subject of a date in question, the "research hours" will be eliminated. It is regrettable the Complainant's attorneys spent so much time in re-arguing their case-in-chief in the documents for the attorney fee request without

devoting short specific explanation of matters researched, subjects of conferences and telephone calls, and subjects discussed with witnesses.

Mr. Ratner's hours will be discussed first. His hours are reduced by 1773 hours. Drastic reductions were made due to the non-specific quality of many items, the work on unrelated matters, excessive "legal research" and the plethora of conference hours. I allowed reasonable air travel time because the case necessitated travel from Mr. Ratner's office to Wilmington, N.C. I do not find merit to the argument that local counsel could have handled the case since GE is the largest single employer in Wilmington, and finding a local attorney would naturally be difficult. Respondent's attorneys were also from out of town. Reduction was further made on the basis that much of the time spent was for items of work that were clerical and administrative in nature. Further, as Respondent, suggests, the excessive hours per day are just not credible, considering the consecutive days claiming over 16 hours per day.

Mr. Ratner's experience and background, while impressive, does not convince this judge that it is worth \$185.00 per hour for this type of case. On the one hand, Mr. Ratner argues that he should receive credit for all hours on research because the field of law involving "whistle blower" cases was unfamiliar to him, but at the same time he expects the same fee as for his acknowledged field of expertise. The "lodestar" figure here would be 185. times the hours left, 341, totalling \$63,085.00. I have taken into account, however, the factors set forth in *Johnson, supra.* and the guidelines of *Lindy supra.* I found the most helpful were the factors for adjustment of the lodestar figure discussed in the *Lindy* case: (1) complexity and novelty of issues; (2) quality of work observed by the judge; (3) amount of recovery. As was stated above, in the discussion of *DeFord*, the case is a simple one with three basic elements to prove. Actually,



in this case, the only element of the three requiring more than minimal evidence was the connection between the discriminatory acts and the "protected activity". This could have been accomplished in far less time by the testimony of the Complainant, witness Malpass and one or two management witnesses. Witness Mossman was needed on rebuttal of the points made by the defense and the psychologist expert was needed to establish a portion of proof of damages. This court repeatedly admonished counsel to limit adversary hostilities and to avoid excessive direct examination and cross-examination. Additionally, far too much time was wasted on arguing minor points of evidence as well as service of subpoenas on unnecessary witnesses. The quality of Mr. Ratner's trial work observed by this judge would be rated as below average for the most part. Associate counsel Schiller elicited far more pertinent information in his examination in considerably less time than Mr. Ratner took for establishment of minor points. The time spent in producing material that was newsworthy for newspapers and television, may have been needed, as Mr. Ratner put it, to force GE into a position to settle the case, but it had no place during court-room hours.

The amount recovered, when the value of the back pay and fringe benefits are considered along with compensatory damages, was adequate in this case. The contingency factor is a plus for Complainant's attorney, but a minor one considering the facts of the case.

I find that total trial time for the Complainant's case, including rebuttal evidence should have taken three and one-half days. Time for the defense could not be controlled by Complainant's counsel, though cross-examination could have been reduced. Accordingly, I reduce the hourly rate to \$100.00 due to consideration of the three *Lindy* adjustment factors. Total fee allotted to Mr. Ratner: \$34,100.00.

Following the same format as in the reduction of Mr. Ratner's requested hours, I reduce Mr. Schiller's hours by 456.75, so that his total allowable hours total 366.75. The "lodestar" for Schiller, using the hourly rate requested would equal a total fee of \$45,843.75. However, in considering that Mr. Ratner was the lead attorney, along with the three factors of *Lindy*, I reduce the hourly rate to \$90.00. I found Mr. Schiller more effective than Mr. Ratner in examination of witnesses, less of a disruptive element in court, but much of his work duplicated that of Mr. Ratner's and his talents were wasted in clerical or administrative work. His total fee is therefore adjusted to \$33,007.50.

I find that the use of any other attorneys was unnecessary considering that *two* attorneys handled the defense of this case in excellent fashion. In many ways, considering the adverse finding by the Department of Labor administrator and the fact situation, the defense case was the more difficult to present. I therefore eliminate Mr. Nagle's fees entirely.

I also eliminate the cost of Ms. Jo G. Wilson's fees and expenses, as representing the ordinary costs of running a law office. Two paralegals were not needed. Ms. Zubrin's paralegal hours, through no fault of her's, nevertheless involved much research that had no materiality to this case. Some of her research pertained to proper subjects and her work in the courtroom saved time for the court as well as attorneys. Such work was needed specifically for this case. However, a good deal of Ms. Zubrin's work could be classified as straight secretarial, and I have deducted accordingly. I allow 60 hours representing the total allotted, for Ms. Zubrin's services after deductions, or \$1,200.00.

Mr. Jeannett's hours appear to be those of a legal secretary, and nothing is allowed for his time. (See *Hensley v. Echerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983)).

With reference to costs and expenses, I find that expert witnesses Mossman and Boyle were necessary but Respondent's counsel makes a valid point in stating that the hours for witness Mossman were excessive in view of 15 minutes of testimony. Even considering that the expert assisted Mr. Ratner in devising relevant questions of Respondent's witnesses, I find that much of Mr. Mossman's time was unnecessary for this case. All of the time allotted, during brief testimony, to setting out Mr. Mossman's standards vis a vis NRC's or those of GE appear barely relevant. Keeping in mind that an extra trip was necessitated due to unforeseen changes in scheduling of witnesses and that possibly eight hours were spent waiting to be called on the first day that his testimony was expected, I will allow a total of \$1,850.00 to include this witness' fees and expenses.

The other items of "expense" and costs are outrageous with reference to Mr. Ratner. Expenses listed for Mrs. English are not of the type allowable under the statute and regulations, therefore none are allowed. Expenses for Schiller, though also excessive, appear much more in line. I will allow the costs of reasonable photocopying, some subpoena service charges and other normal costs plus a reasonable amount towards airfare and hotel charges for the two attorneys and Ms. Zubrin, taking into account that I consider the length of the trial as unreasonable, and much of the overhead expense as relating to immaterial matters. The total allowable for reasonable costs and expenses is \$2,850.00 (additional to attorney, paralegal and Professor Mossman's expense). This includes Dr. Boyle's time, in court only. Anything over and above that amount, I find to be unnecessary due to the excessive trial time used, the immaterial motions, the proceedings in other courts and the excessive document production. No other items, whether termed fees, expenses or costs are allowed, though all documents on fees, expenses and costs have been considered.

## ORDER

1. Respondent General Electric Company is to take affirmative steps to cease discriminatory acts against Complainant.

2. Complainant is to be reinstated to her former position together with compensation for any back pay loss calculated from the time of the last pay period plus interest at a rate per annum equivalent to the coupon yield of the average accepted auction price of the last 52-week U.S. Treasury bills. Such interest shall be payable from the date of Complainant's cessation of employment to the date that such back pay is actually paid. Any rate increase since the cessation of employment is to be calculated into the back pay compensation.

3. Complainant is to be reinstated as to terms, conditions and privileges of her employment so as to make her whole for any such losses suffered by cessation of employment.

4. Respondent is entitled to set off any contributions owed to savings plans formerly participated in by Complainant, if such employee contributions ceased during her time off employment, and in order to bring Complainant up to date on any such plan.

5. Compensatory damages are awarded, and are intended to cover past and future medical expenses (not already covered under any employee Health and Accident plan which is to be fully reinstated pursuant to order No. 3 above) and as recompense for the humiliation and mental suffering of the Complainant due to Respondent's discriminatory acts. Said compensatory award is \$70,000.00.

6. Respondent is to pay Complainant's attorneys fees and expenses, as follows:

- (a) A fee for legal services to Mozart Ratner, Esq. of \$34,100.00.

- (b) A fee for legal services to Arthur M. Schiller, Esq. of \$33,007.50.
- (c) A fee for para-legal services of \$1,200.00.
- (d) Expert witness fees and expenses for Professor Mossman of \$1,850.00.
- (e) All other costs and expenses not covered above, including Dr. Boyle's courtroom appearance fee, in the amount of \$2,850.00.

The aggregate amount of the above costs and expenses allowed to Complainant is \$73,007.50.

/s/ Robert J. Brissenden  
 ROBERT J. BRISSENDEN  
 Administrative Law Judge

Dated: Aug. 1, 1985  
 San Francisco, CA

RJB:scm

# NUCLEAR REGULATORY COMMISSION

## GENERAL ELECTRIC COMPANY

Wilmington, North Carolina Facility

Docket No. 70-1113

### ISSUANCE OF DIRECTOR'S DECISION UNDER 10 CFR 2.206

Notice is hereby given that the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support has granted in part and denied in part a petition under 10 CFR 2.206 filed by Anthony Z. Roisman and Mozart G. Ratner on behalf of Vera M. English (Petitioner). In her petition, Mrs. English requested imposition of a civil penalty in the amount of \$40,635,000 upon General Electric (GE), plus \$37,500 per day for every day after April 6, 1987, that GE does not take corrective action, and imposition of a license condition upon GE requiring the Licensee to fully compensate Mrs. English for her economic losses in the past and future resulting from GE's alleged discrimination, for medical expenses entailed as a result of the alleged discrimination, for expenses incurred in "fighting GE", and for "physical and mental pain she has endured" as a result of GE's actions.

The Petitioner's request that enforcement action be taken against GE has been granted. As a result of this decision, a Notice of Violation and Proposed Imposition of Civil Penalty in the amount of \$20,000 is also being issued. However, the Petitioner's requests that the NRC impose a civil penalty in the amount of \$40,635,000 plus \$37,500 per day for each day after April 6, 1987 and that the NRC impose a license condition upon GE requiring the Licensee to compensate Mrs. English for her expenses and losses are denied. Furthermore, the Petitioner's re-



quest as set forth in her December 13, 1984 petition that the NRC take enforcement action against GE based upon certain other alleged instances of wrongdoing is also denied.

The reasons for this decision are fully described in the "Director's Decision Under 10 CFR 2.206," issued on this date, which is available for public inspection in the Commission's Public Document Room, 1717 H Street, NW, Washington, DC 20555.

FOR THE NUCLEAR REGULATORY COMMISSION

/s/ Hugh L. Thompson Jr.  
HUGH L. THOMPSON, JR.  
Deputy Executive Director for Nuclear  
Materials Safety, Safeguards and  
Operations Support

Dated at Rockville, Maryland  
this 13th day of March 1989

SEP 12 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

No. 89-152

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

VERA M. ENGLISH,  
v. *Petitioner,*

GENERAL ELECTRIC COMPANY,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

**RESPONDENTS' BRIEF IN OPPOSITION**

PETER G. NASH  
Counsel of Record  
DIXIE L. ATWATER  
OGLETREE, DEAKINS, NASH,  
SMOAK AND STEWART  
2400 N Street, N.W.  
Fifth Floor  
Washington, D.C. 20037  
(202) 887-0855  
*Counsel for Respondent*

28 p

## **QUESTION PRESENTED**

May state tort law be used to regulate alleged "whistle-blower" discrimination in the nuclear industry where Congress has established a pervasive and delicately-balanced regulatory scheme governing such conduct in Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, and where the application of state tort standards to such claims would frustrate the objectives and purposes of Congress reflected in that statute?



**RULE 28.1 STATEMENT**

Respondent General Electric Company has the following subsidiaries (other than wholly-owned subsidiaries) and affiliates, not including subsidiaries whose shares or debt securities are not publicly held: General Electric Capital Corporation; General Electric Credit Corporation; General Electric Credit International, N.V.; General Electric Overseas Capital Corporation; and RCA Corporation.

**TABLE OF CONTENTS**

	Page
QUESTION PRESENTED .....	i
RULE 28.1 STATEMENT .....	ii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE CASE .....	1
A. Petitioner's Violation of Federal Safety Standards and Allegations Regarding General Electric's Response .....	1
B. Petitioner's Federal Administrative Complaints..	3
C. Petitioner's Tort Suit .....	4
REASONS WHY THE WRIT SHOULD BE DENIED .....	5
I. THE FOURTH CIRCUIT RECOGNIZED AND CORRECTLY APPLIED THIS COURT'S PRE-EMPTION PRECEDENTS .....	5
A. Congress Created a Pervasive Federal Scheme Covering the Conduct Alleged by Petitioner .....	7
B. State Actions Involving Whistleblower Claims Will Frustrate the Federal Scheme....	10
II. THERE IS NO CONFLICT IN THE LOWER COURTS SUFFICIENT TO WARRANT CERTIORARI .....	20
CONCLUSION .....	22

## TABLE OF AUTHORITIES

CASES	Page
<i>Brown &amp; Root, Inc. v. Donovan</i> , 747 F.2d 1029 (5th Cir. 1984) .....	9
<i>California Coastal Comm'n v. Granite Rock Co.</i> , 480 U.S. 572 (1987) .....	13, 15-16
<i>Chrisman v. Phillips Industries, Inc.</i> , 242 Kan. 772 (1988) .....	20
<i>De Ford v. Secretary of Labor</i> , 700 F.2d 281 (6th Cir. 1983) .....	7
<i>Decanas v. Bica</i> , 424 U.S. 351 (1976) .....	19
<i>English v. Whitfield</i> , 858 F.2d 957 (4th Cir. 1988) .....	7, 8
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977) .....	16-18
<i>Fidelity Federal Savings &amp; Loan Ass'n v. De la Cuesta</i> , 458 U.S. 141 (1982) .....	6
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941) .....	6
<i>Kansas Gas &amp; Electric Co. v. Brock</i> , 780 F.2d 1505 (10th Cir. 1985), <i>cert. denied</i> , 478 U.S. 1011 (1986) .....	12
<i>Lingle v. Norge Division of Magic Chef, Inc.</i> , 486 U.S. —, 100 L. Ed. 2d 410 (1988) .....	16, 19
<i>Malone v. White Motor Corp.</i> , 435 U.S. 497 (1978) .....	5
<i>Motor Coach Employees v. Lockridge</i> , 403 U.S. 274 (1971) .....	14
<i>Norman v. Niagara Mohawk Power Corp.</i> , 873 F.2d 634 (2d Cir. 1989) .....	8, 9
<i>Norris v. Lumberman's Mutual Casualty Co.</i> , 687 F. Supp. 699 (D. Mass. 1988) .....	20
<i>Norris v. Lumberman's Mutual Casualty Co.</i> , — F.2d —, 1989 WL 85883 (1st Cir. 1989) .....	21-22
<i>Pacific Gas &amp; Electric Co. v. Energy Resources Comm'n</i> , 461 U.S. 190 (1983) .....	6, 8, 9
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) .....	14
<i>Sears, Roebuck &amp; Co. v. San Diego County District Council of Carpenters</i> , 436 U.S. 180 (1978) .....	17

## TABLE OF AUTHORITIES—Continued

	Page
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) .....	6, 9, 11
<i>Snow v. Bechtel Construction, Inc.</i> , 647 F. Supp. 1514 (C.D. Cal. 1986) .....	20
<i>Stokes v. Bechtel North American Power Corp.</i> , 614 F. Supp. 732 (N.D. Cal. 1985) .....	20
<i>Wheeler v. Caterpillar Tractor Co.</i> , 108 Ill. 2d 502 (1985), <i>cert. denied</i> , 475 U.S. 1112 (1986) .....	20
<i>Wisconsin Dept. of Industry v. Gould Inc.</i> , 475 U.S. 282 (1986) .....	5, 11, 14
STATUTES	
Energy Reorganization Act, Section 210, 42 U.S.C. § 5851 .....	<i>passim</i>
MISCELLANEOUS	
S. Rep. No. 95-848, 95th Cong., 2d Sess. (1978) .....	9
47 Federal Register 54585 (Dec. 3, 1982) .....	12

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

---

No. 89-152

---

VERA M. ENGLISH,  
v. *Petitioner,*  
GENERAL ELECTRIC COMPANY,  
*Respondent.*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

---

**RESPONDENT'S BRIEF IN OPPOSITION**

---

**STATEMENT OF THE CASE**

In this case Petitioner English seeks review of a Fourth Circuit judgment dismissing her state tort claim for intentional infliction of severe emotional distress on the ground that the tort claim is preempted by Section 210 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851. The factual and procedural background underlying the case is summarized briefly below.

**A. Petitioner's Violation of Federal Safety Standards and  
Allegations Regarding General Electric's Response**

Vera English worked in the Chemical-Metallurgical ("Chemet") Laboratory at General Electric's Wilmington, North Carolina nuclear fuel manufacturing facility



until March 15, 1984. On that date she was removed from the Chemet Lab and reassigned to a temporary job outside the nuclear "controlled area" after admitting that she had deliberately failed to clean up potentially dangerous radioactive contamination in the Laboratory as required by applicable radiation safety procedures, thereby causing a violation of the requirements of the Atomic Energy Act. See Pet. App. 2a, 8a-10a. On May 15, 1984, English was advised that the temporary job would continue for only three months from April 30 and that, during that time, she should bid on a permanent job in an area of the facility that was not nuclear-sensitive. Pet. App. 10a. On July 30, 1984, the temporary job ended and English, having failed to bid on another job, was placed on layoff (*id.*)—a circumstance she describes as "fired."<sup>1</sup>

In a series of legal actions over three years culminating in the present lawsuit, English has alleged that she was discriminatorily removed from the Chemet Lab and ultimately terminated because she had earlier complained about alleged GE safety violations to GE officials and to the Nuclear Regulatory Commission ("NRC"). Pet. App. 10a. In addition, English alleged that she was subjected to other retaliatory acts of harassment between the time she was removed from the Chemet Lab and her ultimate termination, including, for example, being isolated from her fellow workers and watched constantly by a member of management, being barred from nuclear-sensitive controlled areas, being sent home one day to change into "safe shoes," etc. *Id.* at 9a-10a. According to English, GE undertook all of these activities for the purpose of punishing her for making safety complaints, preventing

<sup>1</sup> In fact, English was laid off with full lack-of-work benefits and subsequently was placed in a non-working leave status which allowed her to retire under GE's pension plan and which included substantial medical and other insurance benefits. See *English v. Whitfield*, 858 F.2d 957, 960 n.1 (4th Cir. 1988).

her from obtaining evidence to prove that GE was not in compliance with federal safety regulations, and humiliating and exposing her to the contempt and ridicule of her fellow employees in order to teach her and other GE employees that they should not insist upon compliance with federal safety regulations or report such violations to the NRC. *Id.* at 10a.

#### B. Petitioner's Federal Administrative Complaints

The first of English's legal actions commenced on August 24, 1984, when she filed a complaint with the U.S. Department of Labor ("DOL") under Section 210 of the ERA, which prohibits nuclear industry employers from retaliating against employee "whistleblowers." In the DOL action, English sought approximately \$2.3 million in backpay and compensatory damages for emotional pain and suffering, and over \$1 million in attorney's fees and expenses for litigating her claims. That proceeding involved considerable pretrial discovery, consumed 11 days of trial, produced almost 2,500 pages of transcript and 120 exhibits, and culminated in over 500 pages of post-trial briefs and attachments submitted on behalf of English alone.

Although the DOL Administrative Law Judge ("ALJ") recommended that a Section 210 violation be found with respect to English's job reassignment and resulting termination, the Secretary of Labor ultimately ruled that claims relating to these matters were barred by the statute of limitations in Section 210. *English v. General Electric Company*, No. 85-ERA-2 (Secretary's Decision, January 13, 1987). On judicial review, the Fourth Circuit affirmed that conclusion, but remanded the case to DOL for consideration of whether English had established that she was subjected to a course of retaliatory harassment following her removal from the Chemet Lab. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). On remand, the ALJ determined that the

harassment claim should also be dismissed based on his factual finding that English was not subjected to any acts of harassment after her removal from the Chemet Lab was made final. *English v. General Electric Company*, No. 85-ERA-2 (ALJ Recommended Decision and Order, April 5, 1989). That determination is presently pending before the Secretary of Labor pursuant to English's exceptions to the ALJ's recommended decision.

Concurrent with the DOL proceedings, English commenced a second action before the Nuclear Regulatory Commission in which she contended that GE's alleged discriminatory treatment violated the NRC's nuclear safety requirements. English urged the NRC to fine GE over \$40 million for these alleged violations, and to order GE to pay English over \$2.3 million for lost wages, psychological pain and suffering, etc. The NRC rejected English's claim for compensatory relief but, over GE's objection, imposed a \$20,000 fine based on the DOL ALJ's unreviewed recommendation that a Section 210 violation be found with respect to English's termination. See Pet. App. at 57a-58a.<sup>2</sup>

### C. Petitioner's Tort Suit

Finally, English commenced the instant action in the district court on March 13, 1987. In her complaint, English asserted that these same acts constituted a "wrongful discharge" in violation of public policy and intentional infliction of severe emotional distress under North Carolina law. For these alleged wrongs, she sought almost \$1.5 million in compensatory damages and approximately \$2.3 billion in punitive damages. Pet. App. 6a.

Thus, for its efforts to meet nuclear safety concerns by removing from the nuclear-controlled area of its facility a single employee who, by her own admission, deliber-

<sup>2</sup> GE had challenged the merits of the ALJ's first recommended decision before the Secretary of Labor, but the Secretary never reached those issues because of his statute of limitations ruling.

ately allowed a radioactive safety hazard to exist, GE was met with three separate legal actions claiming total aggregate damages, penalties and attorney's fees of several billion dollars. On February 10, 1988, the district court granted GE's pre-answer motion to dismiss the last of these actions. Pet. App. 6a-29a. The court dismissed English's wrongful discharge and emotional distress claims on the ground that the claims are preempted by Section 210 of the ERA, and also dismissed the wrongful discharge claim on the alternative ground that her allegations failed to state a claim upon which relief can be granted under North Carolina law. *Id.* at 29a.<sup>3</sup>

On appeal, the Fourth Circuit affirmed the district court's preemption finding for the reasons expressed in the district court's opinion. Pet. App. 3a. The instant petition for certiorari followed the Fourth Circuit's denial of English's petition for rehearing and suggestion for rehearing *en banc*.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. THE FOURTH CIRCUIT RECOGNIZED AND CORRECTLY APPLIED THIS COURT'S PREEMPTION PRECEDENTS

As both courts below recognized, the ultimate determinant of federal preemption is congressional intent. *E.g.*, *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 290 (1986); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). Although Congress may occasionally state such an intent expressly, Congressional intent to preempt is more often found in the nature of the federal legislation. For example:

Congress' intent to supersede state law altogether may be found from "a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supple-

<sup>3</sup> English did not appeal the district court's dismissal of her wrongful discharge claim. Pet. App. 2a n.1.



ment it,' [or] because the Act 'of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject . . . .'"

*Pacific Gas & Electric Co. v. Energy Resources Comm'n*, 461 U.S. 190, 203-204 (1983), quoting *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

Moreover, even if it cannot be shown that Congress has evidenced an intent to displace entirely all state regulation in a given area, such state regulation is nevertheless implicitly preempted if it conflicts with federal law. Such a conflict exists not only when a state statute or rule of decisional law substantively conflicts with a specific federal mandate, but also "where state law 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress'" reflected in the federal statute. *Id.*, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Thus, where "the imposition of a state standard in a damages action would frustrate the objectives of the federal law," the state action is preempted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

Applying these standards in the instant case, the lower courts found that English's emotional distress claim was preempted because it sought relief for actions covered by Section 210 of the ERA, which the courts found to be "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . ." Pet. App. at 22a-23a, quoting *Pacific Gas & Electric*, 461 U.S. at 204. Equally important, the courts below found that imposition of state tort standards to actions cognizable under Section 210 would conflict with federal law by frustrating the accomplishment and execution of the full purposes and objectives of Congress reflected in that provision. Pet. App. at 19a-23a. The courts were right on both counts.

#### A. Congress Created A Pervasive Federal Scheme Covering the Conduct Alleged By Petitioner

It is clear that Section 210 of the ERA does, in fact, establish a pervasive scheme of regulation which provides extraordinarily broad protection and remedies for nuclear industry whistleblowers. See Pet. App. at 12a-13a. That section provides that nuclear industry employers may not "discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because the employee has made safety complaints or has otherwise participated in actions to carry out the purposes of the ERA or Atomic Energy Act. § 210(a), 42 U.S.C. § 5851(a). Moreover, the statute provides a detailed and specific administrative procedure for enforcing these prohibitions through investigations and hearings conducted by the Department of Labor, with review in the federal courts of appeals. §§ 210(b), (c), (d) and (e). Indeed, the statute specifically states that determinations under Section 210 "shall not be subject to judicial review in any criminal or other civil proceeding" (§ 210(c)(2)), thus indicating that Section 210 issues should not be considered in collateral state proceedings.

The remedies that Congress has provided are also unusually comprehensive. The Secretary of Labor is not only authorized to award the usual "make whole" remedies for employment discrimination (e.g., reinstatement and backpay), but may also award compensatory damages for pain and suffering, emotional distress, reimbursement of medical expenses, etc. § 210(b)(2)(B). See, e.g., *English v. Whitfield*, 858 F.2d at 964; *De Ford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983). In fact, the Secretary may also award a Section 210 complainant attorney's fees and litigation expenses (*id.*), and the Secretary (but not the complainant) may even seek punitive damages in judicial proceedings brought to enforce Section 210 orders against employers who disregard those orders. Compare § 210(d) and § 210(e).



It is equally clear that English's claim in the instant case seeks to regulate conduct governed by and fully compensable under Section 210. See Pet. App. 18a. Indeed, English already invoked these pervasive federal remedies when she first complained about her alleged mistreatment. In reviewing the Secretary's decision in English's earlier DOL proceeding, the Fourth Circuit expressly recognized that the same harassing actions alleged in the instant case may form the basis of a Section 210 violation, for which compensatory emotional distress damages may be recovered. *English v. Whitfield*, 858 F.2d at 958, 963-964.

Thus, the courts below plainly did not disregard this Court's decisions in determining that English's state claims sought to regulate conduct that fell within a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to intrude. See *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 637-638 (2d Cir. 1989) (dismissing RICO complaint involving alleged harassment of nuclear industry whistleblowers on the ground that Section 210 provides exclusive remedy for such harassment).

Moreover, the latter inference is even stronger when one considers that the subject matter of the federal regulatory scheme involves nuclear safety, where the federal interest is so dominant that preemption is presumed. Indeed, in *Pacific Gas & Electric*, 461 U.S. at 212, this Court held that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." While the courts below refused to find English's state claim preempted on the independent ground that Section 210 is a nuclear safety statute which falls within the *Pacific Gas* rationale, the dominant purpose of the ERA is safety. The whistleblower protections and remedies that Congress crafted are not primarily designed to regulate labor relations. Instead, they reflect Congress' considered judgment

about how best to promote and protect safety at nuclear facilities. See Senate Report accompanying Section 210, S. Rep. No. 95-848, 95th Cong., 2d Sess. p. 29 (1978) (purpose of Section 210 is to "help assure that employers do not violate requirements of the Atomic Energy Act"); *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1035 (5th Cir. 1984) ("[T]he overall plan of the ERA is to maintain public safety not restructure the employee-employer relationship."). In these circumstances, Section 210 must be deemed part of Congress' comprehensive federal scheme for ensuring nuclear safety, and hence it preempts state regulation of the same conduct under this Court's holding in *Pacific Gas & Electric*. See *Norman v. Niagara Mohawk*, 873 F.2d at 637 (finding Section 210 exclusive remedy for nuclear whistleblower harassment because, *inter alia*, "[i]n a field as specialized and technical as nuclear energy, the importance of [the] interplay between [DOL and NRC in considering whistleblower matters] cannot be overemphasized").

Nor is this conclusion changed, as English asserts (Petition at 18-20), by the Court's subsequent decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), where the Court held that the Atomic Energy Act ("AEA") does not preempt state tort actions for personal injuries caused by nuclear radiation exposure. As the courts below recognized (Pet. App. at 14a-15a, 23a), this Court's finding of no preemption in *Silkwood* was premised on the fact that Congress' intent *not* to preempt radiation exposure suits was clear from the post-AEA enactment of the Price-Anderson Act, which established a system of indemnifying nuclear licensees for such nuclear exposure damages in state tort suits. That enactment "indicate[d] that Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies." 464 U.S. at 251-252.

Furthermore, as the lower courts noted (Pet. App. at 15a), the *Silkwood* Court's conclusion was also premised

on the belief that Congress would not have displaced state remedies without enacting a federal remedy for exposure to nuclear radiation or contamination. Here, by contrast, the two key underpinnings of *Silkwood* are absent: there is no similar indication of Congressional intent to use state tort law to regulate whistleblower claims of nuclear employees; and Congress has, in fact, provided a comprehensive federal remedy for such claims.

In short, English's state tort claim is properly preempted because whistleblower retaliation is a matter of federal nuclear safety regulation and also because Congress has established a pervasive federal statutory scheme to regulate such conduct.

#### B. State Actions Involving Whistleblower Claims Will Frustrate the Federal Scheme

As the courts below soundly predicted, there are at least three ways in which state tort actions by nuclear whistleblowers would frustrate the purposes and objectives of Section 210.

*First*, Section 210(g) of the ERA evidences a delicate balance in the rights and obligations of nuclear industry employers. See Pet. App. at 19a-21a. That provision states that the protections of Section 210(a) "shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended." The inclusion of such a limitation indicates a Congressional judgment that overarching nuclear safety concerns require that an employer be free to take action against an employee who deliberately causes safety violations—as in this case—without fear that those decisions will be second-guessed by a reviewing tribunal which may not be sufficiently attuned to nuclear safety considerations.

*Second*, the lower courts were equally on target in judging the effect that potential punitive damage awards

would have on considerations underlying Congress' enactment of Section 210. See Pet. App. at 21a-22a. As the foregoing demonstrates, Section 210 embodies a delicate balance between, on the one hand, the nuclear safety considerations that make the protection of whistleblowers important, and, on the other hand, the nuclear safety considerations that make it important not to chill an employer's right to take action against deliberate safety violators who can be a danger to themselves and others.

As part of this careful balance of interests, Congress decided not to permit Section 210 complainants to seek punitive damages. This decision represented a conscious, deliberate and informed judgment that nuclear industry employers should *not* be subject to such damages in suits by nuclear whistleblower employees. And this conclusion is made even clearer by the fact that Congress *did* permit punitive damages under the whistleblower provisions covering other industries (see Pet. App. at 21a) and specifically delineated the circumstances in which such damages should be permitted in the nuclear industry by allowing *the Secretary of Labor* (but not a Section 210 complainant such as petitioner) to seek such damages when employers disobey the Secretary's orders (§ 210(d)). Thus, the very possibility that such damages might be considered in a state tort action further supports a finding of preemption:

"[T]o allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict" [with the federal regulatory scheme] . . . because "the range and nature of those remedies that are and are not available is a fundamental part" of the comprehensive system established by Congress.

*Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. at 287 (citations omitted).<sup>4</sup>

<sup>4</sup> This Court's decision in *Silkwood* does not compel a different result. The *Silkwood* Court found in the Price-Anderson Act an



Indeed, the instant case presents a vivid example of the problem, since English's complaint admits that she deliberately left a radioactive spill in the Chemet Lab in an attempt to establish the legitimacy of her earlier safety complaints, and yet she seeks \$2.3 billion in punitive damages because GE responded by removing her from the Lab. Thus, it is clear that the assertion of state jurisdiction in cases such as this would result in frustration of the very nuclear safety concerns Congress addressed when it enacted Section 210.

*Third*, the lower courts correctly concluded that allowing state tort suits would frustrate the safety considerations underlying the time limits built into the ERA. See Pet. App. at 22a. Those short limitations periods provide an incentive for employees who have been discriminated against for voicing internal safety complaints to raise their charges promptly and thus to precipitate the speedy airing of their underlying safety complaints.<sup>5</sup>

---

express indication that Congress intended to allow state tort suits based on radiation exposure to proceed, whereas the ERA specifically excludes punitive damage claims by Section 210 complainants. Equally important, the federal statute and policies involved in *Silkwood* did not entail the same kind of delicate balancing that is inherent in Section 210. In particular, the potential for state court punitive damages in the *Silkwood* situation carries with it no downside safety risk—it would only serve to make employers more careful about accidental radiation exposure. By contrast, the possibility of massive punitive damages in a Section 210-type tort suit might make an employer so timid that dangerous employee acts would not be dealt with appropriately.

<sup>5</sup> The Department of Labor and the NRC have entered into a Memorandum of Understanding pursuant to which DOL notifies the NRC of all Section 210 complaints and the NRC provides DOL any technical assistance and advice relating to nuclear safety matters. See 47 Fed. Reg. 54585 (Dec. 3, 1982); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1509-1510 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (discussing DOL and NRC cooperation and interaction on Section 210 matters).

Thus, as the courts below concluded, there are *safety* reasons for the short limitations periods, and those reasons would be undermined if employees could simply ignore the Section 210 filing period and, instead, file common law suits at any time during the typical three-year statute of limitations period for state tort suits.

English argues, however, that the lower courts' conclusions are not sufficient to support federal preemption because the areas of frustration and conflict identified by the courts are "hypothetical" and represent only "potential" conflicts. She contends that federal preemption is proper only when there is "actual conflict," and hence that her claim cannot be preempted until it is adjudicated, at which point it can be determined whether the resolution of her claim conflicts with Section 210. Thus, according to English, it is improper to preempt her tort claim if there is any possible outcome of her claim that would not actually conflict with Section 210. Petition at 14-17, citing *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

English's assertions are wrong for two reasons. First, the areas of frustration and conflict identified by the lower courts arise from the mere availability of state tort actions for whistleblower discrimination, not from the particular outcome of such suits. For example, the availability of long state tort limitations period may frustrate the nuclear safety purposes of the short limitations periods in Section 210. In this case, in fact, English did not file her tort suit until nearly three years after the alleged incidents about which she complains. In addition, her assertion of a multi-billion dollar claim for punitive damages shows why even the possibility of such a claim may inappropriately chill nuclear industry employers' appropriate response to deliberate safety violators.

Second, this Court's decisions make clear that federal preemption may be warranted by the risk of conflict



inherent in dual and disparate systems regulating the same conduct. For example, the Court has found that in the National Labor Relations Act ("NLRA") Congress intended to establish a delicate system of protected and prohibited activities in order to promote the ultimate goal of that statute—free collective bargaining—and that Congress also carefully chose some remedies for violation of that statute, while rejecting others. In view of this statutory scheme, and Congress' decision to commit the enforcement of that statute to a specific federal tribunal, this Court has judged that permitting states to regulate the same conduct that is governed by the federal statute presents a *risk* of conflict that makes federal preemption necessary. See *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. at 286 (1986) ("States may not regulate activity that the NLRA protects, prohibits or arguably protects or prohibits . . . [b]ecause 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity.'"); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959) (noting that the Court's preemption doctrine is "concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes"); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 291 (1971), quoting *Garmon*, 359 U.S. at 244 ("To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a *danger of conflict* between power asserted by Congress and requirements imposed by state law.") (emphasis added).<sup>6</sup>

<sup>6</sup> The Court recognized in *Lockridge* that "disparities in remedies and administration could produce substantial conflict . . . between the relevant state and federal regulatory schemes [which] could not [be] effectively and responsibly superintend[ed] on a case-by-case basis." 403 U.S. at 294. In addition, the Court specifically noted

Thus where, as here, Congress has created a delicately balanced system of rights and remedies and has committed enforcement of these rights to a federal administrative tribunal, it is entirely appropriate to regard the federal scheme as preempting state regulation of the same conduct. That obviously does not mean, as English asserts (Petition at 15-16), that Section 210 would also preempt state actions dealing with race discrimination, sex discrimination, etc., since Section 210 does not purport to deal with issues of that sort. It does mean, however, that English may not utilize state tort law to regulate whistleblower retaliation, and that it is unnecessary to await the outcome of her case to make that preemption determination.<sup>7</sup>

that the balance created by Congress could be disrupted by the availability of different remedies in state actions:

[The dissent] apparently regards the remedial aspects of the federal scheme as unimportant to those who designed it. For example, assuming arguendo that petitioner's conduct was prohibited under both federal and state law, [the dissent] would deem it of no national significance if one State punished such conduct with a jail sentence, and another utilized punitive damages, while the NLRB merely awarded back pay. His position apparently is that Congress considered any state tribunal equally capable, with the Board, of assessing the appropriateness of a given remedy and was unconcerned about disparities in the reactions of the States to unlawful union behavior. This argument, too, seems incompatible with the simple fact that Congress committed enforcement of the federal law here involved to a centralized agency.

*Id.* at 288 n.5.

<sup>7</sup> Although English argues that *California Coastal Comm'n* requires non-preemption if there is any possible state court judgment that would not directly conflict with Section 210, that case does not stand for the proposition for which English cites it. In that case, Granite, a mining company, challenged California's right to require a state permit before Granite could undertake mining activity on federal lands for which the company had already obtained the necessary federal permits. The company premised its preemption argument on three federal statutes and regulatory provisions. In

Finally, there remains English's contention that two decisions of this Court specifically permit North Carolina to supplement the federal remedies in Section 210 via an emotional distress claim, or to provide relief because her claim is based on a "separate font" of substantive rights. Petition at 10-14, citing *Farmer v. United Brotherhood of Carpenters*, 130 U.S. 290 (1977), and *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. —, 100 L. Ed. 2d 410 (1988). Neither *Farmer* nor *Lingle* conflicts with the lower courts' decision in this case, and *Farmer* actually supports it.

those provisions, the Court found affirmative evidence of Congress' intent not to preempt the imposition of state *environmental* regulations on such mining activities, although it found that there was reason to believe that Congress had preempted the application of state *land use management* regulations. While the Court recognized that state environmental regulations may sometimes be so severe as to rise to the level of land use regulations (480 U.S. at 587), Granite's challenge to the state permit requirement before the specific permit conditions were delineated prevented the Court from determining whether that line between non-preempted and preempted state actions had been crossed. Thus, it was in this context that the Court concluded that Granite's facial challenge to California's permit requirement before specific permit conditions had been imposed would have to stand or fall on the question of whether there was any possible set of permit conditions that would constitute permissible environmental regulation rather than preempted land use regulation.

Equally important, moreover, it appears that the *California Coastal* majority would have joined the four dissenting Justices in finding preemption if they had been convinced that environmental regulation and land use regulation were indistinguishable. See *id.* at 594. In this regard, the dissent believed that the federal permit system represented a careful balance between competing federal interests, and that states should not be permitted to re-strike that balance by a duplicative permit system. *Id.* at 605. Thus, if anything, *California Coastal Comm'n* teaches that where, as here, the states would be addressing the very same matters deliberately committed to a federal decisionmaker, the states are prohibited from acting.

*Farmer v. Carpenters* involved a union member's state court action against the union alleging that the union had discriminated against him in hiring hall referrals and had intentionally inflicted emotional distress on him through a campaign of public ridicule and incessant verbal abuse. All of the plaintiff's claims were held preempted by the NLRA except a very limited, potential emotional distress claim.

Despite the *Farmer* Court's conclusion that the plaintiff's emotional distress claim might not be preempted by the NLRA, *Farmer* plainly supports just the opposite determination in the instant case—i.e., that English's emotional distress claim is preempted by Section 210 of the ERA. The primary reason the Court found the possibility of no preemption in *Farmer* was the fact that the focus of an NLRB proceeding concerning the plaintiff's allegations would be entirely different from the focus of a state court proceeding on the plaintiff's emotional distress claim:

Whether the statements or conduct of the respondents also caused [the plaintiff] severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award [the plaintiff] damages for pain, suffering or medical expenses.

430 U.S. at 304.<sup>8</sup>

By contrast, however, a proceeding under Section 210 covers the same ground as English's emotional distress claim in this case. As the lower courts recognized, under Section 210 the Secretary of Labor may consider claims

<sup>8</sup> The Court later applied the same standard in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 197 (1978), where the Court held that, for purposes of preemption, the "critical inquiry" is whether the controversy to be presented to the state tribunal is the same as, or different from, the controversy that could be presented to the NLRB.



for emotional and physical injuries and award damages for pain, suffering and medical expenses. Had the NLRB similarly dealt with such matters, the *Farmer* Court apparently would have held the plaintiff's emotional distress claim preempted.

More importantly, the *Farmer* Court was careful to emphasize that all of the plaintiff's employment discrimination claims *were* preempted and that those allegations *could not* form the basis of the plaintiff's state claims for intentional infliction of emotional distress. The Court stated:

[D]iscrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state court tort action is based; to hold otherwise would undermine the preemption principle. Nor can threats of such discrimination suffice to sustain state court jurisdiction. It may well be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

430 U.S. at 305 (footnote omitted).

For purposes of the instant case, then, the teachings of *Farmer* are clear. First, since DOL proceedings under Section 210 consider and remedy complainants' emotional distress injuries, English's present claim is preempted as a matter of law. Second, since all of English's allegations in support of her emotional distress claim are actually allegations of employment discrimination cognizable under Section 210, her claim must be preempted under the *Farmer* holding that instances of employment discrimi-

nation cannot be used to support state claims of emotional distress.

Nor is this conclusion changed by *Lingle v. Norge Division of Magic Chef*, decided last term. According to English, *Lingle* changed the law regarding NLRA preemption and established that "overlapping" or "parallel" state and federal claims may go forward even when the federal claims arise under a comprehensive federal regulatory scheme such as the NLRA or the ERA.

*Lingle* held no such thing, however. Contrary to English's assertion (Petition at 13), *Lingle* did not involve what is commonly known as "NLRA preemption" which, as explained above, prohibits states from regulating the same conduct that is governed by the federal statute. See *Lingle*, 100 L. Ed. 2d at 420 n.8 (noting that NLRA preemption is distinct from the preemption doctrine at issue in *Lingle*). Rather, *Lingle* involved alleged preemption under Section 301 of the Labor Management Relations Act ("LMRA"), which is aimed solely at ensuring uniformity in the interpretation of collective bargaining agreements under a system of federal common law. *Id.* at 417 and n.3. Given this goal, Section 301 preempts only state actions whose resolution requires interpretation of such bargaining agreements, and it does *not* bar independent state actions which are merely premised on the same facts but do not require any contract interpretation. *Id.* at 419-421. Thus, *Lingle* did nothing to change the Court's well-established doctrine that where, as here, Congress has legislated a comprehensive and delicately-balanced system of federal regulation which is enforced by a specified federal tribunal, states may not offer "parallel" or "overlapping" claims and remedies for the same conduct governed by the federal system.<sup>9</sup>

<sup>9</sup> The remaining case cited by English, *Decanas v. Bica*, 424 U.S. 351 (1976), is also distinguishable from the instant case. The state statute challenged in that case prohibited the employment of illegal aliens, and this Court found that the allegedly preempting federal



## II. THERE IS NO CONFLICT IN THE LOWER COURTS SUFFICIENT TO WARRANT CERTIORARI

English contends that this Court should grant certiorari to resolve a conflict among the lower courts as to the preemptive effect of Section 210. Petition at 20-22. She cites two allegedly conflicting decisions—one from a state supreme court and one from a federal district court—which held that Section 210 does not preempt state wrongful discharge claims.<sup>10</sup> The alleged conflict is neither significant enough nor precise enough to warrant certiorari.

First, English herself acknowledges that no other decisions involve preemption of the same tort claim (intentional infliction of emotional distress) at issue in the present case. See Petition at 21.

Second, in the only state supreme court decision holding a state tort claim not preempted by Section 210 (*Wheeler v. Caterpillar Tractor Co.*), the Illinois court decided the preemption issue *sua sponte* without the bene-

statute (the Immigration Act) was not intended to regulate the employment of illegal aliens. 424 U.S. at 359. Here, by contrast, English is attempting to utilize state tort law to regulate alleged nuclear whistleblower retaliation, which is precisely the conduct that Congress intended to regulate in Section 210.

<sup>10</sup> *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502 (1985), cert. denied, 475 U.S. 1112 (1986); *Stokes v. Bechtel North American Power Corp.*, 614 F. Supp. 732 (N.D. Cal. 1985).

Three other decisions cited by English do not conflict with the instant case inasmuch as they held that state claims are preempted by Section 210. *Chrisman v. Phillips Industries, Inc.*, 242 Kan. 772 (1988); *Norris v. Lumberman's Mutual Casualty Co.*, 687 F. Supp. 699 (D. Mass. 1988); *Snow v. Bechtel Construction, Inc.*, 647 F. Supp. 1514 (C.D. Cal. 1986).

The remaining decisions cited in the last section of English's petition (Petition at 23) involve preemption under Section 301 of the LMRA. For the reasons stated earlier in the discussion of this Court's *Lingle* decision, those cases have no relevance to the instant case.

fit of a thorough briefing and analysis of that question. See Pet. App. at 16a. Furthermore, *Wheeler* was premised on a very superficial reading of this Court's *Silkwood* decision. See *Wheeler* dissent and Pet. App. at 23a.

Third, none of the cases cited by English involved a plaintiff who, by her own admission, deliberately caused a violation of safety standards which resulted in a violation of the requirements of the Atomic Energy Act. As pointed out in the preceding section, this factor raises issues regarding competing nuclear safety considerations under Section 210(g) which are committed to the Department of Labor in consultation with the NRC. See note 5, *supra*. Thus, the preemption analysis applicable in this case may be different from that which might be appropriate in cases which do not involve deliberate nuclear safety violators.

Finally, no more significant conflict is presented by the First Circuit's recent reversal of the district court's preemption finding in *Norris v. Lumberman's Mutual Casualty Co.*, 687 F. Supp. 699 (D. Mass. 1988), *rev'd*, — F.2d —, 1989 WL 85883 (1st Cir. 1989), which was decided after English filed her petition. The First Circuit is the only circuit to have found that Section 210 does not preempt a state tort claim, but the *Norris* decision does not present a square conflict with the instant case.

As the First Circuit emphasized, unlike petitioner English, the plaintiff in *Norris* had made only internal safety complaints; thus, there was a substantial question whether the plaintiff even fell within the protections of Section 210(a), the remedies for which he himself had never sought to invoke. See 1989 WL 85883, p. 4 ("Unlike the case at bar, the plaintiff in *English* reported to the NRC that there were many safety hazards and illegal practices in the place where she worked"). In addition, the *Norris* plaintiff worked for an insurance company involved in inspectional services rather than

for a nuclear facility. He was also pressing a different type of state tort claim against his insurance company employer, and the First Circuit carefully limited its holding accordingly: "We hold that there is no conflict between state law actions for wrongful discharge and [Section 210]." 1989 WL 85883, p. 8. Finally, the First Circuit specifically noted that, unlike the *English* case, Section 210(g) issues relating to deliberate safety violators were not implicated in *Norris*, so that this provision presented only a speculative conflict in that case. 1989 WL 85833, p. 7.

In sum, the smattering of lower court decisions dealing with Section 210 preemption do not present the kind of precise and pervasive conflict that makes certiorari appropriate in this case.

### CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

PETER G. NASH  
Counsel of Record  
DIXIE L. ATWATER  
OGLETREE, DEAKINS, NASH,  
SMOAK AND STEWART  
2400 N Street, N.W.  
Fifth Floor  
Washington, D.C. 20037  
(202) 887-0855  
*Counsel for Respondent*

Dated: September 12, 1989

(3)  
No. 89-152

Supreme Court, U.S.  
FILED

OCT 3 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

---

VERA M. ENGLISH,

*Petitioner,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

---

**PETITIONER'S SUPPLEMENTAL BRIEF IN  
SUPPORT OF HER PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

---

*Of Counsel:*

M. TRAVIS PAYNE  
EDELSTEIN, PAYNE & NELSON  
P. O. Box 12607  
Raleigh, N.C. 27605  
(919) 828-1456

ARTHUR M. SCHILLER  
Attorney at Law  
Suite 401  
21 DuPont Circle, N.W.  
Washington, D.C. 20036  
(202) 857-5658  
*Counsel for Petitioner*

35 pp



## TABLE OF CONTENTS

	Page
Table of Authorities .....	ii
The First Circuit Opinion in <i>Norris v. Lumbermen's Mutual Casualty Company</i> , Case No. 89-1019 (August 3, 1989) Confirms That There is a Compel- ling Conflict .....	1
Conclusion .....	5

## TABLE OF AUTHORITIES

## Page

## CASES

<i>English v. General Electric Company</i> , 683 F.Supp. 1006 (E.D.N.C. 1988).....	1, 2
<i>Gaballah v. Pacific Gas &amp; Electric Co.</i> , 711 F.Supp. 988 (N.D. Cal. 1989).....	2
<i>Norris v. Lumbermen's Mutual Casualty Company</i> , 687 F.Supp. 699 (Mass. 1988).....	1, 2, 4
<i>Norris v. Lumbermen's Mutual Casualty Company</i> , First Circuit Case No. 89-1019 (August 3, 1989).....	2, 3, 4

## STATUTES

Section 210 of the Energy Reorganization Act, 42 USC Section 5851.....	<i>passim</i>
--	---------------

**The First Circuit Opinion in *Norris v. Lumbermen's Mutual Casualty Company*, Case No. 89-1019 (August 3, 1989) Confirms That There is a Compelling Conflict**

At page 21 of her Petition, Vera English cited the District Court decision in *Norris v. Lumbermen's Mutual Casualty Co.*, 687 F.Supp. 699 (Mass. 1988). Subsequent to the filing of her Petition, the First Circuit issued a decision in the *Norris* case, reversing the District Court. That decision, favorable to Petitioner, conflicts with the decision of the Fourth Circuit herein and should compel the granting of the Petition.

The District Court in *Norris* ruled that the plaintiff's state law claims were preempted by the nuclear whistleblower provision, Section 210 of the Energy Reorganization Act, 42 USC Section 5851. In doing so, the court relied on the lower court decision in this case, *English v. General Electric Company*, 683 F.Supp 1006 (E.D.N.C. 1988), and quoted at length from that decision.

The court in *English* did not find preemption based upon concerns over nuclear safety. 1988 WL 30288, p. 1012. Rather the *English* court found preemption based upon its review of the employment remedy in Section 210 and its legislative history (citing S. Rep. No. 848, 95th Cong., 2d Sess. 29, reprinted in 1978 U.S. Code Cong. & Ad. News 7303, 7304). The focus of the court's interpretation was that Congress enacted Section 210 primarily for employee protection, and that the particular remedial restrictions of Section 5851 would either conflict with state standards or would frustrate federal objectives. *English*, 1988 WL 30288, p. 1015. The district court found Subsection (g) to be "strong evidence of Congress' intent to preempt state

actions for wrongful discharge . . . " *English*, 1988 WL 30288, p. 1014.

*Norris*, *supra*, at 703.

In reversing the District Court, the First Circuit specifically rejected the arguments and conclusions of the *English* court on the issue of preemption.

The [*English*] court felt that subsection (g) of the statute, which bars an employee from obtaining redress if she has caused a violation of any nuclear safety requirement, was a strong indication of preemption. It reasoned that this bar is not recognized in state law and "the state court would not be required to determine whether or not the aggrieved employee violated some requirement of the Atomic Energy Act or its amendments." 683 F.Supp. at 1014.

*Norris*, slip op. at 11, Appendix p. 10.<sup>1</sup>

Rejecting this rationale, the First Circuit concluded " . . . that section 5851 has not preempted plaintiff's state law actions for wrongful discharge." *Norris*, slip op. at 15, Appendix p. 14.<sup>2</sup> The First Circuit then went further and concluded not only that state causes of action were not preempted, but that such claims could have a beneficial

<sup>1</sup> A copy of the First Circuit's opinion in *Norris* is contained in the Appendix to this Brief.

<sup>2</sup> See also, *Gaballah v. Pacific Gas & Electric Co.*, 711 F.Supp. 988 (N.D. Cal. 1989), another opinion that discusses *English* and rejects its conclusion that Section 210 preempts state causes of action. 711 F.Supp. at 990.

effect that is consistent with the Congressional intent manifested in Section 210.

We hold that there is no conflict between state law actions for wrongful discharge and section 5851. In fact, the state law action may strengthen and expand the established public policy of protecting whistle blowers in the nuclear energy industry.

*Norris*, slip op. at 20, Appendix p. 18.

The First Circuit ruling in *Norris* thus creates a clear conflict with the Fourth Circuit's ruling in the present case. Indeed, not only is there a conflict, but the First Circuit has expressly addressed and rejected the very reasoning relied upon by the Fourth Circuit in the instant case. Thus there is a compelling need for this Court to resolve the conflict between the circuit courts and provide guidance to potential litigants and the lower courts concerning the preemptive effect of Section 210.

In its Brief in Opposition to the Petition, Respondent briefly discusses the First Circuit's opinion in *Norris*, but blithely asserts that " . . . no more significant conflict is presented by the First Circuit's recent reversal of the district court's preemption finding in *Norris* . . . ". Respondent's Brief, p. 21. Respondent attempts to distinguish the *Norris* decision from the present case on the grounds that the plaintiff in *Norris*, unlike Mrs. *English*, had only made internal company complaints, and had not made a complaint to the Nuclear Regulatory Commission. Respondent's Brief, pp. 21-22. In making such a



distinction, Respondent blatantly misrepresents the *Norris* opinion to this Court.<sup>3</sup>

Even the District Court in *Norris* concluded that internal company complaints were covered by Section 210, and thus this fact had no impact on its ruling concerning preemption. 687 F.Supp. at 702. But, if there were any doubt about the significance of the internal versus external complaints issue, the First Circuit unequivocally laid that to rest, stating "... whether internal complaints are covered by section 5851 is immaterial ...". *Norris*, slip op. at 7, Appendix p. 6.<sup>4</sup> Thus, notwithstanding Respondent's attempt to mislead this Court by misrepresenting the holding in *Norris*, given the obvious and compelling conflict between the First Circuit's decision in *Norris* and that of the Fourth Circuit herein, this Court should proceed to resolve the conflict by granting the Petition for a Writ of Certiorari.

---

<sup>3</sup> It should be noted that in spite of the practice of submitting copies of unpublished decisions if they are cited in a brief, Respondent did not tender to this Court a copy of the First Circuit's opinion in *Norris*.

<sup>4</sup> Respondent's internal-external basis for distinguishing *Norris* is clearly baseless, for, as found herein by the District Court (Appendix to Petition pp. 7A-8A), and the Administrative Law Judge (Appendix to Petition pp. 33A-34A), Mrs. English reported her health and safety concerns both internally to General Electric's management and externally to the Nuclear Regulatory Commission.

## CONCLUSION

For the reasons set forth in the Petition and this Supplemental Brief, the Writ of Certiorari should be granted and this matter should be set for argument before this Court.

Respectfully submitted this the 3rd day of October, 1989.

### *Of Counsel*

M. TRAVIS PAYNE  
EDELSTEIN, PAYNE & NELSON  
P. O. Box 12607  
Raleigh, NC 27605  
(919) 828-1456

ARTHUR M. SCHILLER  
Attorney at Law  
21 DuPont Circle, N.W.  
Suite 401  
Washington, DC 20036  
(202) 857-5658  
*Counsel for Petitioner*

## **APPENDIX**

App. 1

**United States Court of Appeals  
For the First Circuit**

---

No. 89-1019

RICHARD D. NORRIS,  
Plaintiff, Appellant,

v.

LUMBERMEN'S MUTUAL CASUALTY COMPANY,  
Defendant, Appellee.

---

APPEAL FROM THE UNITED STATES  
DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Edward F. Harrington, *U.S. District Judge*]

---

Before

Bownes and Torruella, *Circuit Judges*,  
and Re,\* *Judge*.

---

*Ernest C. Hadley for appellant. Calvin M. Grove with  
whom Cary Schwimmer and Fox and Grove, Chartered, were  
on brief for appellee.*

---

AUGUST 3, 1989

---

BOWNES, *Circuit Judge*. Richard D. Norris, plaintiff-  
appellant, appeals from the district court's dismissal of

---

\*The Honorable Edward D. Re, Chief Judge of the United  
States Court of International Trade, sitting by designation.



his wrongful discharge action based on Massachusetts contract and tort law against defendant-appellee, Lumbermen's Mutual Casualty Company (Lumbermen). The case had been removed by Lumbermen from the state court to federal court. The district court dismissed Norris' suit because the court determined that it was preempted by federal law. *Norris v. Lumbermen's Mut. Casualty Co.*, 687 F. Supp. 699 (D. Mass. 1988). For the reasons set forth, we reverse.

### I. FACTS

Lumbermen provides insurance and inspectional services to nuclear power plants. The inspectional services are provided during the construction phase of a nuclear power plant and precede the issuance of an operating license by the Nuclear Regulatory Commission.<sup>1</sup> From 1976 until his discharge in 1987, Norris was employed by Lumbermen in its Kemper Insurance Group as the Northeast Regional Manager of the Special Inspection Services Section. As Regional Manager, Norris' duties included establishing and implementing inspectional services, assuring that all such services were in compliance with applicable standards, soliciting and retaining clients, and providing direct inspection and audit services to Lumbermen's clients. Norris' complaint alleges three incidents where he voiced his concern about matters of safety relating to Lumbermen's inspectional services.

<sup>1</sup> Quality assurance inspections and audits are required by the Nuclear Regulatory Commission (NRC). 10 C.F.R. § 50 App. B (1987); see also *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985) (describing the NRC program), cert. denied, 478 U.S. 1011 (1986).

In April 1985, Norris was assigned to investigate a complaint regarding reactor pressure vessels at the Vogle Nuclear Power Station in Georgia. Another Lumbermen inspector had inspected the vessels when they were manufactured. Norris determined that the original inspector had been negligent in his inspection, and Norris reported this to his supervisor, Robert Muise. In mid-1986, Muise requested that, because of pending litigation involving the vessels, Norris have a supervisor delete, from an employee appraisal report, any reference to the substandard inspection. Norris objected but when Muise insisted, he complied.

In June 1986, Norris investigated a former employee who had worked as an inspection trainee at the Seabrook Nuclear Power Plant. His preliminary investigation discovered several problems which he felt warranted a full investigation. He reported this to Muise. Muise indicated that such an investigation could interfere with the completion of Seabrook's data report certifications, which are distributed, *inter alia*, to the Nuclear Regulatory Commission. Muise told Norris to ignore his preliminary findings and not to investigate the matter further. Norris complied.

In December 1986, Muise revised Lumbermen's inspection instructions and standards in such a way as to eliminate a verification technique which would have identified the defective pressure vessels at Vogle. Norris objected to the revision but took no further action.

In March 1987, Public Service Electric and Gas Company (PSE&G) hired Lumbermen to conduct an audit at its Salem Nuclear Power Plant in New Jersey. Norris

informed Muise that he would be conducting the audit on Lumbermen's behalf. Norris conducted the audit in May 1987. Shortly thereafter, Lumbermen's Internal Security Division investigated Norris' activities at PSE&G. It concluded that Norris' activities had been conducted without Lumbermen's consent or knowledge, constituted a conflict of interest and resulted in Norris' personal financial gain. The investigation also found that Norris submitted fraudulent expense vouchers and time sheets from 1985 to 1987. Norris denies the charges with respect to his activities at PSE&G and claims that Lumbermen encouraged him to misrepresent his expenditures.

In June 1987, Lumbermen fired Norris. Lumbermen did not inform Norris of its investigation or offer him a chance to respond to its allegations. Lumbermen had contacted PSE&G on at least two occasions while Norris was still working for Lumbermen and gave it false and harmful information regarding Norris. Lumbermen did not inform Norris of these communications. After Lumbermen discharged Norris, he applied for a job with PSE&G but it did not hire him.

#### Procedural History

In November 1987, Norris filed suit in Massachusetts Superior Court. Norris' complaint contained three counts. Count I alleged that defendant

has intentionally breached the implied covenant of good faith and fair dealing in terminating the employment of Plaintiff in retaliation for the faithful discharge of his employment duties consistent with state

and federal laws, such termination violating the dictates of public policy.

Count II alleged that defendant

has intentionally and knowingly disseminated untrue and harmful information regarding Plaintiff and his employment with Defendant thereby interfering with Plaintiff's right to contract with other employers in his chosen professional field.

Count III alleged:

Defendant, by and through the actions of its officers, employees and agents, knowingly, intentionally and tortiously wrongfully terminated the employment of Plaintiff for reasons which contravene public policy; to wit, Defendant has terminated Plaintiff in retaliation for exposing policies, practices and procedures of Defendant which impact upon the safe construction and operation of nuclear power plants, and which violate the regulations of the Nuclear Regulatory Commission, and which expose the public to substantial risk of injury and death from nuclear accidents.

Lumbermen removed the case to federal district court on the basis of diversity. 28 U.S.C. § 1441. It then moved to dismiss all counts. Lumbermen contended that all three counts failed to state claims upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). It also contended that counts I and III should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), lack of subject matter jurisdiction, because the claims were preempted by 42 U.S.C. § 5851, the "whistle blower" provision of the Energy Reorganization Act.<sup>2</sup>

<sup>2</sup> Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, is set forth in its entirety as an appendix to this opinion.



The district court granted Lumbermen's motion with respect to counts I and III on the basis of preemption; on these counts, it did not reach Lumbermen's alternative argument concerning the failure to state a claim. *Norris*, 687 F. Supp. at 704. The district court denied the motion to dismiss count II. *Id.* Subsequent to the district court's opinion, the parties agreed to dismiss count II with prejudice. Thereafter, Norris appealed the district court's ruling with respect to the preemption of counts I and III by 42 U.S.C. § 5851.

Norris does not allege that he reported Lumbermen's inspectional lapses to the NRC or otherwise took any action specified in § 5851(a): (1) commenced or caused to be commenced a proceeding for the administration or enforcement of any requirement under the Atomic Energy Act of 1954; (2) testified or is about to testify in any such proceeding; or (3) assisted or participated in any such proceeding. Norris made complaints to his supervisor and filed reports with Lumbermen. These are known as "internal" complaints. Lumbermen argues that internal complaints are covered by § 5851.

We need not decide whether internal complaints are covered by § 5851 for two reasons: since we find that Norris may proceed on the basis of his state law claims, whether internal complaints are covered by § 5851 is immaterial; and the statute of limitations has run as to any claim Norris might have had under § 5851.

## II. PREEMPTION

Preemption of state law on the basis of federal law derives from the Supremacy Clause of the United States Constitution. Art. VI, cl. 2.<sup>3</sup> Preemption may be express or implied. The Supreme Court has described the various bases for preemption as follows:

It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a " 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Even where Congress has not entirely displaced state regulation

---

<sup>3</sup> Art. VI, cl. 2 states in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.



in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

*Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 203-04 (1983); see also *Maryland v. Louisiana*, 451 U.S. 725, 746-47 (1981); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 624-25 (1st Cir. 1987).

But regardless of the starting point, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). And in determining congressional intent, it must be kept in mind that "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. at 746.

The first step in determining congressional intent is to examine the statute. Section 5851(b)(1) states that an aggrieved employee "may . . . file . . . a complaint with the Secretary of Labor." (Emphasis added). The section permits but does not mandate the filing of such actions. It does not state that filing with the Secretary of Labor is the employee's *exclusive* remedy.

The legislative history is not particularly helpful. The Senate Report states that § 5851 is based on similar laws which are codified at 29 U.S.C. § 158 (National Labor Management Act); 30 U.S.C. § 815 (Federal Mine Safety Act); 33 U.S.C. § 1367 (Federal Water Pollution Control Act); and 42 U.S.C. § 7622 (Clean Air Act). S. Rep. No. 848, 95th Cong., 2d Sess. 29 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 7303. The Senate Report does not discuss preemption or the exclusivity of the procedure provided by Congress. The parties have not cited any explicit statement of congressional intent relative to preemption in the laws on which § 5851 is based or their legislative histories.

It is not surprising, therefore, that the courts which have addressed the issue of preemption vis a vis § 5851 and state law claims are split. Some have found preemption: *English v. General Electric Co.*, 683 F. Supp. 1006 (E.D.N.C. 1988), *aff'd per curiam on basis of decision below*, 871 F.2d 22 (4th Cir. 1989); *Snow v. Bechtel Constr. Inc.*, 647 F. Supp. 1514 (C.D. Cal. 1986); *Chrisman v. Philips Indus., Inc.*, 751 P.2d 140 (Kan. 1988). Others have not: *Gaballah v. Pacific Gas & Elec. Co.*, 711 F. Supp. 988 (N.D. Cal. 1989); *Stokes v. Bechtel North American Power Corp.*, 614 F. Supp. 732 (N.D. Cal. 1985); *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372 (Ill. 1985), *cert. denied*, 475 U.S. 1122 (1986).

*English* was a wrongful discharge action against General Electric claiming violation of public policy. Plaintiff also claimed intentional infliction of emotional distress. Unlike the case at bar, the plaintiff in *English* reported to the NRC that there were many safety hazards and illegal

practices in the place where she worked. In finding preemption, the English court first found that Congress did not intend § 5851 "to be a regulator of nuclear safety and therefore preemptive under *Pacific Gas & Electric*." 683 F. Supp. at 1013. The court found that three other aspects of the statute indicated a congressional intent of preemption:

- (1) its applicability only to an employee who has not violated any nuclear requirement, [subsection (g)], (2) the absence of a provision for exemplary damages on behalf of an aggrieved nuclear employee, and (3) the speed with which a charge brought under Section 210 [§ 5851] must be resolved.

683 F. Supp. at 1013.

The court felt that subsection (g) of the statute, which bars an employee from obtaining redress if she has caused a violation of any nuclear safety requirement, was a strong indication of preemption. It reasoned that this bar is not recognized in state law and "the state court would not be required to determine whether or not the aggrieved employee violated some requirement of the Atomic Energy Act or its amendments." 683 F. Supp. at 1014.

*Gaballah v. Pacific Gas & Electric Co.*, 711 F. Supp. 988, 989 (N.D. Cal. 1989), which found no preemption, involved a plaintiff who alleged that he was wrongfully discharged by his employer for pointing out "discrepancies between the 'as built' drawings, on which PG&E's seismic safety calculations were based, and the true conditions of the plant." The court discussed the *English* case. *Id.* at 990. It rejected its finding that subsection (g) of the

federal statute showed a congressional intent of preemption. *Id.* The *Gaballah* court found "no evidence that Congress intended to do more than bar a federal remedy to employees who themselves violated the AEA [Atomic Energy Act]." *Id.* It also pointed out that subsection (g) would be available in state court cases to employers as a federal law defense. *Id.* The court concluded that § 5851 "can hardly be regarded as pervasive federal regulation of the subject of employer-employee relations in the nuclear power industry." *Id.*

In *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372, the Supreme Court of Illinois delved deeply into the preemption issue. It held:

The protection of the lives and property of citizens from the hazards of radioactive material is as important and fundamental as protecting them from crimes of violence, and by the enactment of the legislation cited, Congress has effectively declared a clearly mandated public policy to that effect. We hold, therefore, that counts III and VI stated a cause of action for retaliatory discharge for refusing to work under conditions which contravened the clearly mandated public policy, and the circuit court erred in dismissing them.

*Id.* at 377. There was a dissent taking the contrary position.

The Supreme Court has twice examined the scope of preemption in cases involving the nuclear industry. We have already quoted from *Pacific Gas & Elec. Co. v. Energy v. Resources Comm'n*, 461 U.S. 190, so we start with that. The issue was whether California laws which conditioned the construction of nuclear plants on findings by a state



agency that adequate storage facilities and means of disposal were available for nuclear waste were preempted by the Atomic Energy Act of 1954. *Id.* at 194-95. The Court held first that

Congress, in passing the 1954 Act and in subsequently amending it, intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.

*Id.* at 205. After an in-depth review of the Atomic Energy Act, its amendments and the legislative history, the Court concluded that

Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.

*Id.* at 211-12. The Court stated that the "Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." *Id.* at 212. The Court then went on to find that there was a nonsafety rationale for the California law. It accepted California's determination that the disposal of nuclear waste was an economic, not a safety problem and held that "the statute lies outside the occupied field of nuclear safety regulation." *Id.* at 216.

For our purposes, the teaching of *Pacific Gas & Electric* is clear. The Federal Government has preempted the field where the matter at issue directly involves nuclear safety concerns.

The other Supreme Court case involving the nuclear energy field is *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The issue in *Silkwood* was whether a state-authorized award of punitive damages arising out of the escape of plutonium from a federally licensed nuclear plant was preempted either because it fell within the safety aspects of nuclear energy or because it conflicted with other features of the Atomic Energy Act. *Id.* at 241. The Court pointed out that, in addition to preemption being found on the basis of congressional intent, "state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law." *Id.* at 248. In determining whether the punitive damages award conflicted with federal regulation of the safety aspects of nuclear energy production, the Court found ample evidence that Congress had no intention of forbidding the states to provide state-law remedies for those injured by the escape of radiation in a nuclear plant. *Id.* at 250-251. In fact it found that, "the only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available." *Id.* at 251. It reiterated: "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Id.* at 255. In language that is particularly pertinent to the case at bar, the Court stated:



We do not suggest that there could never be an instance in which the federal law would preempt the recovery of damages based on state law. But insofar as damages for radiation injuries are concerned, pre-emption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law. We perceive no such conflict or frustration in the circumstances of this case.

*Id.* at. 256 (emphasis added). The Court held that the award of punitive damages was not preempted by federal law. The message for us is contained in the underlined language.

For the reasons that follow, we hold that § 5851 has not preempted plaintiff's state law actions for wrongful discharge. First, there is nothing in the words of the statute or its legislative history indicating a congressional intent to bar a whistle blower from bringing a state action for wrongful discharge. As already noted, the language of the statute is permissive not mandatory.

Second, we follow the teaching of *Pacific Gas and Electric* and determine whether § 5851 regulates nuclear safety. We find that § 5851 was not intended to be a regulator of nuclear safety. See *English v. General Elec. Co.*, 683 F. Supp. at 1013. As we read the statute, it is primarily concerned with protecting whistle blowers. It is true that furnishing such protection may result in detecting nuclear safety hazards. But whether or not there is a safety hazard or violation of safety standards would be

determined by the Nuclear Regulatory Commission. As the court pointed out in *Silkwood*: "'Congress' decision to prohibit the States from regulating the safety aspects of nuclear development was premised on its belief that the Commission was more qualified to determine what type of safety standards should be enacted in this complex area." 464 U.S. at 250. A state law action for wrongful discharge does not affect in any way the safety standards promulgated by the Nuclear Regulatory Commission. The issue in such a case is not the efficacy of nuclear energy safety standards, but whether the plaintiff can prove that he was wrongfully discharged.

We next inquire, in accord with *Silkwood*, whether there is "an irreconcilable conflict" between state law and § 5851 "or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." 464 U.S. at 256. We agree with the district court in *Gaballah*, 711 F. Supp. at 990, that subsection (g), which is not implicated in the case at bar, presents only a speculative conflict not a real one. We also agree that the subsection would be available to a defendant as a federal law defense in state court. *Id.*; see also *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157 (1982), in which the Supreme Court stated:

We note, however, that the incorporation of state law does not signify the inapplicability of federal law, for "a fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution."

We do not see how the bringing of a state law wrongful discharge action by an employee for a discharge based on whistle blowing can interfere with the safe operation of nuclear energy plants. We agree with the Illinois Supreme Court that protection of the lives of citizens from the hazards of radioactive material concerns the states as well as the federal government. See *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d at 377.

Most state law actions for wrongful discharge are broader in scope than § 5851. Subsection (a) of the statute provides:

(a) Discrimination against employee

No employer . . . may discharge an employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a *proceeding* under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], or a *proceeding* for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such *proceeding* or;

(3) assisted or participated or is about to assist or participate in any manner in such a *proceeding* or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.]

42 U.S.C. § 5851(a) (emphasis added). Under the statute, there must be a proceeding, either commenced or about to be commenced, before a whistle blower is protected.<sup>4</sup> A state law action for wrongful discharge is triggered by an employee's discharge whether or not she has or will participate in any "proceeding" that may follow.

So also, state law remedies may be broader than those available to a whistle blower under subsection (B):

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

42 U.S.C. § 5851(b)(B). Although the remedies available under the statute are comprehensive, they do not include

<sup>4</sup> There is disagreement in the circuits about the statutory construction to be given to "proceeding." See, e.g. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-13 (10th Cir. 1985), cert. denied, 478 U.S. 1011, 1011-1012 (1986).



punitive damages. In this connection, it is worth nothing that in *Silkwood* the Court upheld a punitive damages award of ten million dollars. 464 U.S. at 245, 258.

Whistle blowing is not directly concerned with safety standards, only the deviation from or the flouting of them. There is no good reason for barring state remedies to whistle blowers but allowing punitive damages under state law to those who are injured by nuclear mishaps that might not have occurred if the whistle blower's complaints had been investigated. Allowing whistle blowers to proceed in state court indirectly promotes nuclear safety by subjecting the employer to the threat of a substantial jury award if it retaliates against a whistle blower by wrongfully discharging him. The economic aspect of the state law claim may induce an employer to investigate a whistle blower's complaints rather than fire her.

We hold that there is no conflict between state law actions for wrongful discharge and § 5851. In fact, the state law action may strengthen and expand the established public policy of protecting whistle blowers in the nuclear energy industry.

### III. THE STATE LAW CLAIMS

Lumbermen argues in the alternative that counts I and III fail to state causes of action under Massachusetts law. The district court did not reach this issue. "We are, of course, free to affirm a district court's decision 'on any ground supported by the record even if the issue was not pleaded, tried or otherwise referred to in the proceedings

below.'" *Doe v. Anrig*, 728 F.2d 30, 32 (1st Cir. 1984) (quoting *Brown v. St. Louis Police Department*, 691 F.2d 393, 396 (8th Cir. 1982), cert. denied, 461 U.S. 908 (1983); collecting cases).

We, therefore, turn to Lumbermen's alternative argument. Lumbermen contends that Massachusetts has never extended the breach of an implied covenant of good faith and fair dealing to salaried employees. Thus, it argues that Norris, who was a salaried employee, has failed to state a contract claim in count I. With respect to the tort claim alleged in Count III, Lumbermen contends that Norris' failure to actually blow the whistle by reporting Lumbermen to the NRC and his failure to refuse to carry out his supervisor's orders fatally undercuts his cause of action.

We refuse to dismiss Norris' complaint because we cannot say that "it appears beyond doubt that [Norris] can prove no set of facts which would entitle him to relief." *Lessler v. Little*, 857 F.2d 866, 867 (1st Cir. 1988), cert. denied, 109 S. Ct. 1130 (1989). Count I of Norris' complaint alleges bad faith termination in retaliation for his raising safety issues. The Massachusetts Supreme Judicial Court has "recogniz[ed] the general requirement in this Commonwealth that parties to contracts and commercial transactions must act in good faith toward one another." *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1256 (Mass. 1977). It went on to comment that in every contract, including employment contracts, there exists an implied covenant of good faith and fair dealing. *Id.* at 1257. Lumbermen is simply incorrect in its assertion that Massachusetts does not recognize a claim of bad faith termination by salaried employees. See *Cataldo v.*



*Zuckerman*, 482 N.E.2d 849 (Mass. App.), further review denied, 485 N.E.2d 188 (Mass. 1985) (salaried supervisor entitled to annual bonus amounts provided for inemployment contract).

We recognize that most Massachusetts cases dealing with the contract claim of bad faith termination involved employees whose discharge deprived them of earned commissions. See, e.g., *Maddaloni v. Western Mass. Bus Lines, Inc.*, 438 N.E.2d 351 (Mass. 1982); *Gram v. Liberty Mut. Ins. Co.*, 429 N.E.2d 21 (Mass. 1981); *Fortune*, 364 N.E.2d 1251. The general rule in Massachusetts is that "lost wages and fringe benefits *unrelated to past services*" are not compensable as part of a contract claim for bad faith termination. *Maddaloni*, 438 N.E.2d at 356 (emphasis supplied). The Massachusetts cases equate an unfair denial of earned commissions with unjust enrichment. See, e.g., *Maddaloni*, 438 N.E.2d at 356.

Norris was a salaried employee but he also alleges that he "received additional benefits based on his . . . tenure as an employee of Defendant." To the extent he claims that he has been deprived of additional benefits which are related to his past services, Norris has stated a claim under Massachusetts law. If Norris can prove he was entitled to additional compensation based on his past services, "his tenure," then Lumbermen would be unjustly enriched by discharging him in bad faith. It is also possible that Norris is entitled to a different measure of damages based on the circumstances of this case and considerations of public policy. See *Maddaloni*, 438 N.E.2d at 356 n. 7 ("We need not decide in what circumstances

public policy may require additional damages, or a different measure of damages."). We leave this issue for the district court to decide in the first instance.

Count III of Norris' complaint alleges the tort of wrongful discharge:

Defendant has terminated Plaintiff in retaliation for exposing policies, practices and procedures of Defendant which impact upon the safe construction and operation of nuclear power plants, and which violate the regulations of the Nuclear Regulatory Commission, and which expose the public to substantial risk of injury and death from nuclear accidents.

Under Massachusetts law, "[l]iability can be imposed on an employer who terminates an at-will employee in violation of a clearly established public policy." *Hobson v. McLean Hosp. Corp.*, 52-2 N.E.2d 975, 977 (Mass. 1988); see also *Mello v. Stop & Shop Cos., Inc.*, 524 N.E.2d 105, 106-07 (Mass. 1988). We think that Massachusetts would agree with the statement by the Supreme Court of Illinois:

The protection of the lives and property of citizens from the hazards of radioactive material is as important and fundamental as protecting them from crimes of violence, and by the enactment of the legislation cited, Congress has effectively declared a clearly mandated public policy to that effect.

*Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d at 377.

Lumbermen argues that because Norris *only* made internal complaints (did not publicly blow the whistle) and complied with his supervisor's orders, he is not entitled to claim he was discharged in violation of public policy. This argument misses the target. Regardless of the

public policy statement inherent in § 5851, it cannot be gainsaid that there is a strong public policy, independent of § 5851, favoring the reporting of safety hazards and violations at nuclear energy plants.

We hold that Norris has stated a cause of action under Massachusetts law in counts I and III and may proceed on those counts.

The district court's judgment is reversed and the case remanded for further proceedings consistent with this opinion.

Costs awarded to appellant.

#### APPENDIX

42 U.S.C. § 5851 provides:

##### Employee protection

###### (a) Discrimination against employee

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this

chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

###### (b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph.



Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such a violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

#### (c) Review

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the

order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

#### (d) Jurisdiction

Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

#### (e) Commencement of action

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.



(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

**(f) Enforcement**

Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28.

**(g) Deliberate violations**

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

---

JAN 2 1990

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

VERA M. ENGLISH, PETITIONER

v.

GENERAL ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

KENNETH W. STARR

*Solicitor General*

JOHN G. ROBERTS, JR.

*Deputy Solicitor General*

HARRIET S. SHAPIRO

*Assistant to the Solicitor General*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

ROBERT P. DAVIS

*Solicitor of Labor*

ALLEN H. FELDMAN

*Associate Solicitor*

STEVEN J. MANDEL

*Counsel for Appellate Litigation*

DAVID A. HENNINGRUTH

*Attorney*

*Department of Labor*

*Washington, D.C. 20210*

240

### **QUESTION PRESENTED**

Whether Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, which provides a federal administrative remedy for employees who suffer employment discrimination in retaliation for making nuclear safety complaints, preempts an employee's state law tort claim based on such retaliation.



## TABLE OF CONTENTS

	Page
Statement.....	1
Discussion.....	5
Conclusion .....	18

## TABLE OF AUTHORITIES

### Cases:

<i>Brown &amp; Root, Inc. v. Donovan</i> , 747 F.2d 1029 (5th Cir. 1984) .....	13, 17
<i>California v. ARC America Corp.</i> , 109 S. Ct. 1661 (1989) .....	10
<i>Consolidated Edison Co. v. Donovan</i> , 673 F.2d 61 (2d Cir. 1982) .....	17
<i>Chrisman v. Philips Industries, Inc.</i> , 242 Kan. 772, 751 P.2d 140 (1988) .....	16
<i>De Canas v. Bica</i> , 424 U.S. 351 (1976) .....	6
<i>English v. Whitfield</i> , 858 F.2d 957 (4th Cir. 1988) ..	2, 3, 16
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977) .....	12
<i>Fidelity Federal Savings &amp; Loan Ass'n v. De La Cuesta</i> , 458 U.S. 141 (1982) .....	6
<i>Field v. Philadelphia Elec. Co.</i> , 565 A.2d 1170 (Pa. Super. Ct. 1989) .....	16
<i>Florida Lime &amp; Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963) .....	7
<i>Gaballah v. PG &amp; E</i> , 711 F. Supp. 988 (N.D. Cal. 1989) .....	9, 11, 16
<i>Goodyear Atomic Corp. v. Miller</i> , 108 S. Ct. 1704 (1988) .....	15
<i>Greenwold v. City of North Miami Beach</i> , 587 F.2d 779 (5th Cir.), cert. denied, 444 U.S. 826 (1979) .....	14
<i>Hillsborough County v. Automated Medical Labs., Inc.</i> , 471 U.S. 707 (1985) .....	8
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941) .....	7
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977) ....	7

Cases—Continued:	IV	Page
<i>Kansas Gas &amp; Elec. Co. v. Brock</i> , 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986) .....		17
<i>Kilpatrick v. Delaware County Society for Prevention of Cruelty to Animals</i> , 632 F. Supp. 542 (E.D. Pa. 1986) .....		15
<i>Le Pore v. National Tool &amp; Mfg. Co.</i> , 224 N.J. Super. 463, 540 A.2d 1296 (1988), aff'd, 115 N.J. 226, 557 A.2d 1371, cert. denied, 110 S. Ct. 366 (1989) .....		15
<i>Mackowiak v. University Nuclear Systems, Inc.</i> , 735 F.2d 1159 (9th Cir. 1984) .....		17
<i>Malone v. White Motor Corp.</i> , 435 U.S. 497 (1978) .....		7
<i>Meritor Savings Bank, FSB v. Vinson</i> , 477 U.S. 57 (1986) .....		16
<i>Metropolitan Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724 (1985) .....		7
<i>New York Dep't of Social Services v. Dublino</i> , 413 U.S. 405 (1973) .....		8
<i>Norman v. Niagara Mohawk Power Corp.</i> , 873 F.2d 634 (2d Cir. 1989) .....		16
<i>Norris v. Lumbermen's Mutual Casualty Co.</i> , 881 F.2d 1144 (1st Cir. 1989) .....	5, 9, 14, 15, 16, 17, 18	
<i>Pacific Gas &amp; Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n</i> , 461 U.S. 190 (1983) .....	12, 13, 14	
<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987) ..	8	
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) .....	6, 13	
<i>Savage v. Jones</i> , 225 U.S. 501 (1912) .....	7	
<i>Schneidewind v. ANR Pipeline Co.</i> , 103 S. Ct. 1145 (1988) .....	6	
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) .....	8, 10	
<i>Snow v. Bechtel Constr., Inc.</i> , 647 F. Supp. 1514 (C.D. Cal. 1986) .....	16	
<i>Stokes v. Bechtel N. Am. Power Corp.</i> , 614 F. Supp. 732 (N.D. Cal. 1985) .....	14, 16	
<i>United Constr. Workers v. Laburnum Constr. Corp.</i> , 347 U.S. 656 (1954) .....	10	

Cases—Continued:	V	Page
<i>Wheeler v. Caterpillar Tractor Co.</i> , 108 Ill. 2d 502, 485 N.E.2d 372 (1985), cert. denied, 475 U.S. 1122 (1986) .....		16
<i>Willy v. Coastal Corp.</i> , 855 F.2d 1160 (5th Cir. 1988) .....		12
Constitution, statutes and regulation:		
U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) .....		6
Atomic Energy Act, 42 U.S.C. 2021 (k) .....		13
Clean Air Act, 42 U.S.C. 7415 <i>et seq.</i> :		
42 U.S.C. 7416 .....		12
42 U.S.C. 7622 .....		12
Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601 <i>et seq.</i> :		
42 U.S.C. 9610 .....		12
42 U.S.C. 9610 (a) .....		12
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 <i>et seq.</i> .....		6
29 U.S.C. 1144 .....		6
Energy Reorganization Act, 42 U.S.C. 5851 (§ 210) .....	<i>passim</i>	
42 U.S.C. 5851 (b) (1) .....	3, 4, 10	
42 U.S.C. 5851 (b) (2) (A) .....	4	
42 U.S.C. 5851 (b) (2) (B) .....	4	
42 U.S.C. 5851 (d) .....	4	
42 U.S.C. 5851 (g) .....	4, 9, 17	
Federal Water Pollution Control Act, 33 U.S.C. 1367 .....		12
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 <i>et seq.</i> .....		15
29 U.S.C. 660 (c) .....		15
Resource Conservation and Recovery Act, 42 U.S.C. 6971 .....		12
Safe Drinking Water Act, 42 U.S.C. 300f <i>et seq.</i> :		
42 U.S.C. 300j-9 (i) .....		12
42 U.S.C. 300j-9 (i) (1) .....		12
Toxic Substances Control Act, 15 U.S.C. 2622 .....		12
10 C.F.R. 50.7 .....		11

VI	
Miscellaneous:	Page
124 Cong. Rec. 29,771 (1978) .....	11
47 Fed. Reg. 54,585 (1982) .....	10
S. Rep. No. 848, 95th Cong., 2 <sup>d</sup> Sess. (1978) .....	9, 13

# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

No. 89-152

VERA M. ENGLISH, PETITIONER

*v.*

GENERAL ELECTRIC COMPANY

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE**

---

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

## STATEMENT

Petitioner was employed as a laboratory technician at respondent's nuclear fuels production facility in Wilmington, North Carolina, from 1972 to 1984, when her employment was terminated (Pet. App. 2a, 7a). In this diversity action, petitioner contends that respondent retaliated against her for making nuclear safety complaints, and asserts a state law claim for intentional infliction of emotional distress (*id.* at 6a).

(1)



1. In February 1984, petitioner complained to respondent's management and to the Nuclear Regulatory Commission about a number of perceived violations of nuclear safety standards at the Wilmington facility, including the alleged failure of her co-workers to clean up spills of radioactive materials in the laboratory (Pet. App. 2a, 7a-8a).<sup>1</sup> Frustrated with her employer's failure to address her concerns, petitioner, on one occasion, deliberately failed to clean a work table contaminated with a uranium solution, and instead outlined the contamination with red tape to bring the matter to the other workers' attention (*id.* at 2a, 8a). A few days later, petitioner showed her supervisor the marked-off areas (which had not been cleaned in the interim), and as a result laboratory work was halted while the laboratory was inspected and cleaned (*id.* at 8a-9a; *English v. Whitfield*, 858 F.2d 957, 959 (4th Cir. 1988)).

On March 15, 1984, respondent charged petitioner with a knowing failure to clean up contamination, and temporarily reassigned her to other work (Pet. App. 2a, 9a). On April 30, 1984, management informed her that she would be laid off unless she successfully bid within 90 days for a position in an area of the facility that did not involve exposure to nuclear materials (*id.* at 10a). On May 15, 1984, petitioner was notified of the final company decision affirming this disciplinary action (*English v. Whitfield*, 858 F.2d at 959). When petitioner had not found another position by July 30, 1984, her employment was terminated (*id.* at 960).<sup>2</sup>

<sup>1</sup> Although petitioner made similar complaints over the years (Pet. 6), this action appears to be based solely on events occurring in 1984 (Pet. App. 2a, 7a-8a).

<sup>2</sup> Technically, petitioner was placed on layoff status on July 30, and thus retained certain benefits and recall rights (see Br. in Opp. 2 n.1). See also *English v. Whitfield*, 858 F.2d 957, 960 n.1 (4th Cir. 1988). As a practical matter, however, she was no longer employed by respondent after July 30, 1984.

2. On August 24, 1984, petitioner filed a complaint with the Secretary of Labor under Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, alleging that respondent's actions constituted unlawful employment discrimination in retaliation for her complaints about nuclear safety violations (Pet. App. 3a n.2, 31a). An administrative law judge found that respondent violated the ERA when it transferred and then discharged petitioner (*id.* at 30a-56a), but the Secretary dismissed the complaint as untimely because it had not been filed within 30 days after the May 15 notice of the final company decision (see Section 5851(b)(1)). *English v. General Electric Co.*, No. 85-ERA-2 (Jan. 13, 1987). The Fourth Circuit affirmed the dismissal of petitioner's allegations of unlawful transfer and discharge, but remanded for consideration of her claim that she was subjected to retaliatory harassment after May 15, and that this harassment constituted a continuing violation. *English v. Whitfield*, *supra*. On remand, the ALJ also dismissed that claim. *English v. General Electric Co.*, No. 85-ERA-2 (Recommended Decision and Order Apr. 5, 1989). That decision is currently pending before the Secretary.

3. On March 13, 1987, petitioner filed this action against respondent in federal district court. Petitioner alleged that she had been terminated in violation of the public policy evidenced in federal nuclear safety laws and that she was suffering from severe depression and emotional difficulties as a result of the employer's "intentional, malicious, extreme and outrageous conduct" (Pet. 8; Pet. App. 6a, 11a). In addition to challenging her employer's actions in transferring and ultimately firing her, petitioner alleged that respondent: (1) removed her from the laboratory position under guard "as if she were a criminal"; (2) assigned her to degrading "make work" in her substitute assignment; (3) derided her as "paranoid"; (4) barred her from working in controlled areas; (5) placed her under constant surveillance during work

hours; (6) isolated her from co-workers, even during lunch periods; and (7) conspired to charge her fraudulently with violations of safety and criminal laws (Pet. App. 27a). The complaint requested \$1,328,645 in compensatory damages and approximately \$2.3 billion in punitive damages (*id.* at 6a).

The district court granted respondent's motion to dismiss, concluding that petitioner's wrongful discharge and emotional distress claims were preempted by the whistleblower protection provisions of 42 U.S.C. 5851, and alternatively that she had failed to state a valid cause of action for wrongful discharge under North Carolina law (Pet. App. 6a-29a). The court first rejected the company's arguments that Section 5851 regulates matters of nuclear safety—a field preempted by the federal government—and that petitioner's complaint concerned matters in that preempted field (*id.* at 17a, 18a). But it held (*id.* at 19a-23a) that three aspects of that statute nevertheless manifest a pervasive, comprehensive federal scheme that would be frustrated by pursuit of state law remedies: (1) the provision barring recovery by any employee who "deliberately causes a violation of any requirement of [the ERA] or of the Atomic Energy Act" (42 U.S.C. 5851(g)); (2) the absence of any provision for exemplary (or punitive) damage awards by the Secretary of Labor (42 U.S.C. 5851(b)(2)(B));<sup>3</sup> and (3) the requirement that whistleblowers file their administrative complaints within 30 days after the violations occur, and that the Secretary resolve such complaints within 90 days after filing (42 U.S.C. 5851(b)(1) and (2)(A)). As the court perceived it, Congress enacted these provisions to obtain speedy resolution of nuclear safety concerns, to

<sup>3</sup> The statute does, however, provide for recovery of exemplary damages in civil actions brought by the Secretary to enforce her remedial orders in district court. See 42 U.S.C. 5851(d) (district courts "have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages").

limit exemplary damage awards against the nuclear industry, and to preclude reinstatement and compensation of employees who violate nuclear safety requirements—goals that are incompatible with the broader remedies available under state tort law (Pet. App. 21a-22a). Because the only claims in petitioner's complaint related to retaliatory actions affecting her "terms, conditions, or privileges of employment," matters cognizable under Section 5851, the court concluded that it lacked subject-matter jurisdiction over the action (Pet. App. 28a-29a).<sup>4</sup>

In a per curiam opinion, the Fourth Circuit affirmed the dismissal of petitioner's emotional distress claim for the reasons stated by the district court (Pet. App. 1a-3a).<sup>5</sup> The court of appeals rejected petitioner's argument that Congress did not intend to foreclose whistleblowers from pursuing state tort remedies, and concluded that the district court "correctly identified and applied the relevant federal and state law" (*id.* at 3a).

## DISCUSSION

In holding that petitioner's claim for intentional infliction of emotional distress is preempted by the ERA, the court of appeals has misread Congress's intent in enacting whistleblower protection for nuclear industry employees. Moreover, the Fourth Circuit's decision squarely conflicts with the decision of the First Circuit in *Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144 (1989). In our view, certiorari should be granted

<sup>4</sup> The court alternatively held that petitioner failed to state a cause of action for wrongful discharge, because North Carolina law does not recognize the tort of wrongful discharge absent a specific duration employment contract, the giving of additional consideration for protected tenure, or a discharge for refusing to give perjured testimony (Pet. App. 24a-25a). The court concluded that petitioner had stated a valid state law claim for intentional infliction of emotional distress (*id.* at 26a-27a).

<sup>5</sup> Petitioner did not appeal the dismissal of her wrongful discharge claim, and that claim is accordingly no longer at issue.



to resolve this conflict over the proper interpretation of a significant federal statute.

1. Contrary to the conclusion of the courts below, the ERA does not preempt an employee's state cause of action for intentional infliction of emotional distress resulting from retaliation for making nuclear safety complaints. The Fourth Circuit's analysis of the preemptive effect of Section 5851 is unsound both as a matter of statutory interpretation and because it overlooks the strong presumption against federal preemption in areas of traditional state concern.

a. Pursuant to the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, Congress may preempt state law in several ways. See *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). First, Congress can provide expressly that federal law be given preemptive effect. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, among other statutes, provides a familiar example. See 29 U.S.C. 1144. Absent explicit statutory language, intent to preempt can also be found in a "scheme of federal regulation \* \* \* so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. at 153, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. Preemptive intent can also be found in an Act of Congress that "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or in cases where "the object sought to be obtained by the federal law and the character of obligations imposed by it" support the same assumption. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230; accord *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1150-1151 (1988). But cf. *De Canas v. Bica*, 424 U.S. 351, 359-360 (1976). In addition, state law is preempted to the extent that it actually conflicts

with federal law, *i.e.*, where it is impossible to comply with both federal and state law (see *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)). Finally, preemption also lies where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In preemption inquiries, "[t]he purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). By virtue of important and sensitive federalism concerns, it is presumed that Congress ordinarily does not intend to displace existing state legislative authority, and "[w]here \* \* \* the field which Congress is said to have pre-empted has been traditionally occupied by the States," the intent of Congress to supersede state laws must be "clear and manifest." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Cf. *Savage v. Jones*, 225 U.S. 501, 533 (1912) (state law is deemed to be in conflict with an Act of Congress only if the "purpose of the Act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect").

b. In light of these principles, the courts below erred in concluding that Section 5851 preempts petitioner's claim of intentional infliction of emotional distress. Nothing in the statute's language or legislative history provides "clear and manifest" evidence of congressional intent to create an exclusive remedy for nuclear industry whistleblowers. Moreover, the availability of state remedies will not frustrate, and may even further, the congressional objective in Section 5851 of promoting the safe use of nuclear energy.

Section 5851 does not, of course, contain an express preemption provision. Nor can preemption be implied either from the existence of a federal remedy or from any of the specific factors considered by the courts below.



In the first place, the mere existence of a federal remedy—even a rather comprehensive federal remedy—does not imply preemption of state remedies. As this Court has noted, “[u]ndoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. \* \* \* Instead, we must look for special features warranting preemption.” *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719 (1985). Even where Congress has established a comprehensive regulatory or enforcement scheme, preemptive effect may not be inferred without specific indicia of legislative intent to exclude state activity in that field. See *Hillsborough County*, 471 U.S. at 717 (“merely because the federal provisions [a]re sufficiently comprehensive to meet the need identified by Congress d[oes] not mean that States and localities [a]re barred from identifying additional needs or imposing further requirements in the field”); *New York Dep’t of Social Services v. Dublino*, 413 U.S. 405, 415 (1973) (“[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem”); cf. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (preemptive effect of ERISA’s “comprehensive” civil enforcement scheme is “fully confirmed” by its legislative history).

The precise basis for the result reached in this case by the courts below is not entirely clear.<sup>6</sup> In any event, how-

<sup>6</sup> The district court first indicated (Pet. App. 19a) that it was relying on conflict preemption, quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). But after reviewing Section 5851 and its history, the court then stated that the statute created a “scheme of federal regulation \* \* \* so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it” (Pet. App. 22a-23a). The Fourth Circuit, which adopted the district court’s reasoning (*id.* at 3a), did not elaborate on the matter.

ever, they erred in relying on three particular aspects of the Section 5851 remedial scheme (*i.e.*, the bar to recovery by employees who intentionally violate requirements of the Atomic Energy Act and the ERA, the lack of any express provision for exemplary damage awards in the administrative proceedings, and the expeditious time frames for filing and adjudication of complaints). Neither the limited scope and forms of relief available under the federal statute nor the time limits imposed on proceedings thereunder are sufficient to indicate a congressional intent to eliminate alternative remedies under state law.

Nothing in the legislative history supports the inference the courts below drew from those statutory limitations. The only discussion of those limitations by the responsible congressional committee was a statement that Section 5851(g) would deny relief to employees who deliberately violate nuclear safety requirements, “[i]n order to avoid abuse of the protection afforded *under this section*.” S. Rep. No. 848, 95th Cong., 2d Sess. 30 (1978) (emphasis added). Absent an indication of any broad aim to preclude *all* legal remedies otherwise available to such employees, it is “pure speculation” to read Section 5851(g) as evincing preemptive intent. *Gaballah v. PG & E*, 711 F. Supp. 988, 990 (N.D. Cal. 1989). Moreover, even if Congress had intended such a result, that fact alone would not suggest that state remedies should be denied to all whistleblowers protected by Section 5851. At most, subsection (g) would allow employers to assert a federal law defense in state law actions brought by employees excluded from Section 5851’s protection. See *Norris v. Lumbermen’s Mutual Casualty Co.*, 881 F.2d at 1150; *Gaballah*, 711 F. Supp. at 990.

Similarly, the absence of any authorization for exemplary damage awards by the Secretary under Section 5851 does not indicate an implied congressional intent to bar state actions that permit such awards. In the first place, Section 5851 apparently *does* authorize the award-

ing of exemplary damages in district court proceedings (see note 3, *supra*); its enactment thus was not based, as the district court believed, on "an informed judgment that in no circumstances should a nuclear whistle[] blower receive punitive damages when fired or discriminated against because of his or her safety complaints" (Pet. App. 22a (emphasis added)). More importantly, Congress's decision not to provide a given remedy may reflect the particular federal policy objectives addressed by the federal statute. Such policy choices do not themselves imply an intent to preclude other remedies under state law. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-666 (1954); see also *California v. ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989) ("[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law").

Finally, the expeditious time frames in Section 5851 indicate only that Congress wanted *federal* whistleblower complaints to be filed and resolved quickly. Although the courts below perceived the 30-day filing period as a means by which "the regulatory authorities may discover potential hazards and violations that might otherwise have gone undiscovered for an uncertain period of time" (Pet. App. 22a), nothing suggests that a safety rationale motivated Congress to prohibit other remedies merely because they might be invoked beyond the 30-day period.<sup>7</sup> Considering

<sup>7</sup> Neither the courts below nor the parties discuss another provision of Section 5851 that is arguably relevant to the preemption analysis. Section 5851(b)(1) requires the Secretary of Labor to notify the NRC "[u]pon receipt of \* \* \* a complaint" under the statute—a mandate that has been implemented through a memorandum of understanding by which the two agencies agree "to cooperate with each other to the fullest extent possible" in all cases arising under Section 5851. 47 Fed. Reg. 54,585 (1982). As a result, the NRC is informed of any allegations of whistleblower discrimination, thus enabling that agency to address the underlying safety complaints and to impose its own sanctions on employers

the potential difficulties of complainants in complying with this short time limit, it is more reasonable to assume that Congress viewed the federal statute as supplementing, not supplanting, any state remedies that might exist. See *Gaballah v. PG & E*, 711 F. Supp. at 990.

In sum, none of the aforementioned features of Section 5851 supports the conclusion that Congress intended that statute "to constitute the sole remedy for nuclear facility employees who allege discrimination resulting from safety complaints" (Pet. App. 3a). Nor do those features show that Section 5851 reflects federal policy objectives that cannot be reconciled with the existence of alternative, broader remedies under state law. They thus fall well short of the requisite "clear and manifest" evidence of congressional intent to establish preemption of a state tort claim, the existence of which reflects the State's conclusion that it has "a substantial interest in regulation of

who retaliate against whistleblowing employees. See 10 C.F.R. 50.7. Because Section 5851 protects employees who are "about to commence," "about to testify," or "about to assist or participate" in an NRC proceedings, and even protects employees who file only internal safety complaints with their employer (see note 14, *infra*), its notification requirement enables the NRC to learn of incipient safety complaints that might otherwise be concealed as a result of employer retaliation.

Although this provision suggests that Congress intended the Section 5851 scheme to serve a notification function, we do not believe that Congress intended to preempt state law remedies merely because state actions might not provide notice of the underlying safety issues to the NRC. The brief notification requirement plainly is not a central focus of the statute. Apart from its sponsor's observation that the information provided "would be most relevant to the Commission," 124 Cong. Rec. 29,771 (1978) (remarks of Sen. Hart), the legislative history does not mention the provision, let alone explain its purpose. It is logical to assume that Congress, while interested in prompt notice of safety problems, primarily intended Section 5851 to promote whistleblowing activity by protecting employees against retaliation for their safety complaints—a purpose that might be achieved more fully by permitting such employees access to the potentially broader remedies available under state law.



the conduct at issue." *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 302-303 (1977).<sup>8</sup>

c. The courts below correctly rejected respondent's argument (Br. in Opp. 8-10) that a state law emotional distress claim alleging retaliation for employee safety complaints is preempted in the nuclear field because the sole purpose of such an action is to ensure nuclear safety. As the district court recognized (Pet. App. 17a), that argument fails to acknowledge the valid compensatory purposes served by state actions of this type.

It is well established that Congress has occupied the field of nuclear safety regulation, apart from certain limited powers expressly ceded to the States. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212 (1983). However,

---

<sup>8</sup> We note that some or all of the remedial limitations on which the courts below relied for the preemption finding are also found in six other whistleblower protection statutes. See Toxic Substances Control Act, 15 U.S.C. 2622; Federal Water Pollution Control Act, 33 U.S.C. 1367; Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Resource Conservation and Recovery Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9610. Unlike Section 5851, each of those whistleblower provisions exists in a statutory framework that permits state regulation of the subject matter of the protected whistleblowing. See, e.g., 42 U.S.C. 7416 (preserving, in Clean Air Act, residual state authority to adopt and enforce air pollution standards). It is therefore unlikely that Congress, in placing substantive and procedural limits on the federal remedy in those contexts, meant to foreclose state law remedies for employees who suffer retaliation for assisting in the administration of a cooperative federal-state program. See *Willy v. Coastal Corp.*, 855 F.2d 1160, 1167 n.10 (5th Cir. 1988) (observing that "[t]he states \* \* \* are traditional partners with the federal government in the field[] of \* \* \* environmental regulation," and that a state wrongful discharge action brought by an environmental whistleblower "does not appear to directly conflict with any federal remedy"). Indeed, preemption would be particularly inappropriate under the two statutes that extend protection to whistleblowers who assist in state proceedings. See 42 U.S.C. 300j-9(i) (1) (Safe Drinking Water Act); 42 U.S.C. 9610(a) (CERCLA).

this exclusive federal authority does not include regulation for non-safety purposes. See, e.g., Atomic Energy Act, 42 U.S.C. 2021(k) ("[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards"). As this Court has explained, the test for whether state law falls within an established field of preemption is "whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Pacific Gas & Elec.*, 461 U.S. at 213 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 236). In the nuclear safety context, state action is not prohibited where it is motivated, at least in part, by economic or other concerns unrelated to nuclear safety. See 461 U.S. at 212-216.

Despite respondent's portrayal of the claim for damages as an attempt to discourage employer conduct relating to nuclear safety, petitioner is seeking recovery based only on common-law tort principles that bar the intentional infliction of emotional distress; the state cause of action does not reflect any state policy specifically concerning nuclear safety complaints. To an even greater extent than the moratorium on nuclear power plant construction upheld in *Pacific Gas & Electric*, an emotional distress action in this context has a basis in social and economic policy that saves it from preemption.

This is true even though Section 5851, which also provides a remedy for the kind of harassment alleged in this case, was conceived as part of the federal scheme for regulating nuclear safety. See *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1033 (5th Cir. 1984) ("section 5851 is primarily designed to serve the major purposes of the ERA, in this case, nuclear safety"); S. Rep. No. 848, *supra*, at 29 ("[u]nder this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act"). And it is true even though the "economic aspect of the state law may induce an employer to investigate a whistle blower's com-



plaints rather than fire her." *Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d at 1151.<sup>9</sup>

d. Preemption is not required in order to implement any federal policy. There is no reason to believe that permitting state causes of action would either interfere with the Secretary's authority to adjudicate Section 5851 complaints or would otherwise frustrate the remedial goals of that Act. As this case demonstrates (see p. 3, *supra*), the adjudication of Section 5851 complaints can proceed independently of any state law proceedings.<sup>10</sup> And continued access to state remedies helps achieve Congress's primary goal by providing an additional, and possibly at times more effective, means of deterring employer misconduct that might otherwise impede the NRC's ability to resolve nuclear safety problems.

Nor is it significant that Section 5851 is associated with a federal regulatory scheme that preempts state

<sup>9</sup> Because petitioner did not appeal from the dismissal of her wrongful discharge claim, this Court need not consider whether such a claim would be preempted by Section 5851. A complaint alleging wrongful termination in violation of the public policy evidenced in federal nuclear safety laws might raise a more difficult preemption issue than that presented here. See *Pacific Gas & Elec.*, 461 U.S. at 213. But cf., e.g., *Stokes v. Bechtel N. Am. Power Corp.*, 614 F. Supp. 732, 741-742 (N.D. Cal. 1985) (wrongful discharge claim based on public policy unrelated to nuclear safety concerns is not preempted). Even a cause of action based on a purpose of encouraging nuclear safety complaints may not be preempted if the state's recognition of such a remedy also furthers a policy of compensating the victims of unfair employment practices or some other social or economic objective. See *Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144 (1st Cir. 1989) (concluding that wrongful discharge claim is not preempted), discussed pp. 15-17, *infra*.

<sup>10</sup> See *Greenwald v. City of North Miami Beach*, 587 F.2d 779 (5th Cir.), cert. denied, 444 U.S. 826 (1979) (holding that the analogous whistleblower remedy in the Safe Drinking Water Act is "entirely independent of any local remedies," and that such remedies need not be exhausted prior to the filing of a complaint with the Secretary).

law in other respects. As we have explained, the preemptive effect of the Atomic Energy Act and related statutes is limited to the field of nuclear safety regulation; thus, any state law action that serves non-safety purposes falls outside the area of exclusive federal authority.<sup>11</sup> Moreover, in rejecting assertions of preemption of state actions that have a more direct impact on federally regulated activities than exists here, this Court in *Pacific Gas & Electric* and *Silkwood* recognized that Congress is willing to tolerate the operation of state laws that have only incidental regulatory consequences in the nuclear safety domain. See also *Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704, 1712 (1988) (an increased state workers' compensation award for injury caused by a safety violation at a government-owned nuclear facility is an "incidental regulatory pressure" that Congress finds acceptable). Therefore, even though state remedies for nuclear whistleblowers may also advance federal safety interests, it is appropriate, in the absence of any evidence of a contrary legislative purpose, to assume that Congress intended to permit the incidental consequences of those remedies in addition to the federal sanctions.

2. The decision below directly conflicts with the reasoning and result in *Norris v. Lumbermen's Mutual Casualty Co.*, *supra*. In *Norris*, the First Circuit expressly recognized the conflict (881 F.2d at 1148, 1150), and

<sup>11</sup> Similarly, the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, which preempts state regulation of workplace safety and health with respect to matters governed by a specific federal standard, does not preempt state law remedies for employees who suffer employment discrimination on account of their having filed complaints, testified or otherwise exercised rights under the Act, even though the Act itself provides a federal remedy for the same employer conduct (29 U.S.C. 660(c)). See *Le Pore v. National Tool & Mfg. Co.*, 224 N.J. Super. 463, 540 A.2d 1296 (1988), *aff'd*, 115 N.J. 226, 557 A.2d 1371, cert. denied, 110 S. Ct. 366 (1989); accord *Kilpatrick v. Delaware County Society for Prevention of Cruelty to Animals*, 632 F. Supp. 542, 547-550 (E.D. Pa. 1986).

disagreed with the holding in this case. The *Norris* court concluded that neither the statutory language nor the legislative history of Section 5851 indicates congressional intent to preclude state law remedies. *Id.* at 1147-1151.<sup>12</sup>

Contrary to respondent's position (Br. in Opp. 20-22), the disagreement on the preemption issue between the Fourth and First Circuits is unmistakable. It cannot be avoided by highlighting, as respondent attempts to do, certain differences between the two cases. Although *Norris* involved a wrongful discharge claim, whereas the decision below involves an emotional distress claim, the differing results in the cases cannot be explained away on that basis. Indeed, the district court here found that both petitioner's wrongful discharge claim and her emotional distress claim were preempted on identical grounds.<sup>13</sup> Thus, even though the Fourth Circuit considered preemption under Section 5851 only with respect to an emo-

<sup>12</sup> The district courts have also reached divergent results on whether state law actions brought by nuclear whistleblowers are preempted. Compare *Snow v. Bechtel Constr., Inc.*, 647 F. Supp. 1514 (C.D. Cal. 1986) (state remedies preempted), with *Gaballah v. PG & E*, *supra* (state remedies not preempted), and *Stokes v. Bechtel N. Am. Power Corp.*, 614 F. Supp. 732 (N.D. Cal. 1985) (same). The state courts are also in disagreement. Compare *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140 (1988) (state remedies preempted), with *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N.E.2d 372 (1985) (state remedies not preempted), cert. denied, 475 U.S. 1122 (1986), and *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170 (Pa. Super. Ct. 1989) (same). Cf. *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634 (2d Cir. 1989) (Section 5851 provides exclusive federal remedy).

<sup>13</sup> For purposes of determining that Section 5851 of the ERA preempts state law remedies, the district court treated petitioner's emotional distress claim as indistinguishable from her wrongful discharge claim since both claims alleged conduct cognizable under Section 5851. Pet. App. 23a-24a, 28a-29a. See also *English v. Whitfield*, 858 F.2d 957, 963-964 (4th Cir. 1988) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), for the proposition that retaliatory harassment sufficiently onerous to create a "hostile work environment" violates Section 5851).

tional distress claim, the preemption analysis it adopted would apparently lead to the same result in a wrongful discharge claim. See note 9, *supra*.

Nor is it significant that, unlike petitioner, the employee in *Norris* had made only internal safety complaints<sup>14</sup> and was not himself accused of any nuclear safety violation,<sup>15</sup> or that the employer in *Norris* was a contractor that did not operate a nuclear facility (see Br. in Opp. 21-22). Neither decision turned on whether the employee's conduct was actually protected under federal law; indeed, in their discussion of the preemption question, both courts assumed that Section 5851 would cover the alleged whistleblower activity.<sup>16</sup>

<sup>14</sup> There is some disagreement over whether internal safety complaints constitute protected activity under Section 5851. Three courts of appeals have expressly or impliedly agreed with the Secretary of Labor that they do. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982); but see *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1036 (5th Cir. 1984) (holding that "employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected under section 5851"). The First Circuit in *Norris* found no need to resolve that dispute (see note 16 *infra*). Because petitioner presented her safety complaints to the NRC, that issue is not presented in this case.

<sup>15</sup> Although the First Circuit noted that Section 5851(g), which bars recovery for employees who deliberately violate federal nuclear safety requirements, presented only "a speculative conflict" with state law remedies because the plaintiff in that case had not been accused of any such violation, see 881 F.2d at 1150, the court also observed that any bar on recovery imposed by Section 5851(g) "would be available to a defendant as a federal law defense in state court." *Ibid.* Thus, the court appeared to reject the view of the courts below that the purposes of subsection (g) would be frustrated by the very existence of a state law action (see Pet. App. 19a-21a).

<sup>16</sup> For example, the *Norris* court stated that there was no need to consider whether internal complaints are covered by Section 5851,

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

**KENNETH W. STARR**

*Solicitor General*

**JOHN G. ROBERTS, JR.**

*Deputy Solicitor General*

**HARRIET S. SHAPIRO**

*Assistant to the Solicitor General*

**ROBERT P. DAVIS**

*Solicitor of Labor*

**ALLEN H. FELDMAN**

*Associate Solicitor*

**STEVEN J. MANDEL**

*Counsel for Appellate Litigation*

**JEFFREY A. HENNEMUTH**

*Attorney*

*Department of Labor*

**JANUARY 1990**

---

because that provision does not preempt state law remedies. 881 F.2d at 1146.



5  
No. 89-1E2

Supreme Court, U.S.

FILED

JAN 11 1990

ROBERT E. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

VERA M. ENGLISH,  
*Petitioner,*  
v.

GENERAL ELECTRIC COMPANY,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

**RESPONDENT'S SUPPLEMENTAL BRIEF IN  
RESPONSE TO BRIEF OF THE UNITED STATES**

*Of Counsel:*

BENJAMIN W. HEINEMAN, JR.  
PHILIP A. LACOVARA  
GENERAL ELECTRIC COMPANY  
3185 Easton Turnpike  
Fairfield, Connecticut 06431  
(203) 373-0111

PETER G. NASH  
Counsel of Record  
DIXIE L. ATWATER  
OGLETREE, DEAKINS, NASH,  
SMOAK AND STEWART  
2400 N Street, N.W.  
Fifth Floor  
Washington, D.C. 20037  
(202) 887-0855  
*Counsel for Respondent*

## TABLE OF AUTHORITIES

### CASES

	Page
<i>Connell Co. v. Plumbers &amp; Steamfitters</i> , 421 U.S. 616 (1975) .....	6
<i>Guy v. Travenol Laboratories</i> , 812 F.2d 911 (4th Cir. 1987) .....	5
<i>Norris v. Lumbermen's Mut. Casualty Co.</i> , 881 F.2d 1144 (1st Cir. 1989) .....	8
<i>Pacific Gas &amp; Electric Co. v. Energy Resources Comm'n</i> , 461 U.S. 190 (1983) .....	5
<i>Wisconsin Dept. of Industry v. Gould Inc.</i> , 475 U.S. 282 (1986) .....	2
<i>Wood and Yeargin Construction Co.</i> , 79-ERA-3 (Secretary's Decision, November 8, 1979) .....	4

### STATUTES

Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851 .....	<i>passim</i>
--	---------------

### PROPOSED LEGISLATION

S. 436 .....	2
H.R. 3368 .....	2

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

---

No. 89-152

---

VERA M. ENGLISH,  
v. *Petitioner,*

GENERAL ELECTRIC COMPANY,  
*Respondent.*

---

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit**

---

**RESPONDENT'S SUPPLEMENTAL BRIEF IN  
RESPONSE TO BRIEF OF THE UNITED STATES**

---

Respondent, General Electric Company ("GE"), submits this supplemental brief in response to the brief of the United States filed on January 2, 1990.

1. The most noteworthy and disturbing aspect of the Government's brief is the fact that it does not even mention pending legislation that will likely resolve the preemption issue presented by English's petition. This silence is particularly surprising because the Department of Labor, which participated in preparation of the Government's brief, has taken a strong position before Congress that federal whistleblower legislation *should* preempt state claims.



The proposed bills, each entitled the "Employee Health and Safety Whistleblower Protection Act," were introduced in the Senate (S. 436) on February 23, 1989, and in the House (H.R. 3368) on September 28, 1989. As introduced, both the House and Senate bills expressly provided that the federal legislation would not preempt rights and remedies under state law. S. 436, § 8(b); H.R. 3368, § 8(b). Hearings have been held on both bills,<sup>1</sup> and the Department of Labor has specifically opposed the non-preemption provision (see discussion *infra*). Whatever the outcome on the preemption issue, it now appears that a comprehensive whistleblower statute specifically addressing the question of preemption will be enacted during this session of Congress.

These legislative developments are important to the instant case for two reasons. First, preemption is ultimately a question of Congressional intent,<sup>2</sup> and the Court's preemption determinations are made infinitely more difficult when confronted with a statute that has no express provision regarding its intended preemptive effect. Here, however, the preemption issue facing the Court will likely be authoritatively resolved by Congress before the Court addresses the merits of this case. These facts, coupled with the existence of only the most minimal conflict (if any) in the courts below (see GE Brief in Opposition, pp. 20-22), suggest that the Court should not expend its limited resources considering this case.

Second, the Government's brief to this Court argues that there is no principled basis for concluding that Sec-

<sup>1</sup> Hearings on S. 436 were held in March 1989 before the Senate Subcommittee on Labor of the Committee on Labor and Human Resources. Hearings on H.R. 3368 were held in November 1989 before the House Subcommittee on Labor-Management Relations of the Committee on Education and Labor.

<sup>2</sup> *E.g., Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 290 (1986).

tion 210 of the Energy Reorganization Act (42 U.S.C. § 5851) preempts state actions by whistleblowers like English. Inexplicably, however, that brief fails to mention that within the past several months the Department of Labor has twice argued to Congress that there are compelling reasons supporting preemption. And those reasons are precisely the basis upon which this Court should conclude that Congress intended that Section 210 preempt state actions.

Thus, in an August 14, 1989 letter to Senator Howard Metzenbaum, Secretary of Labor Dole stated that "[t]he Administration believes that, in order to preclude duplicative State law proceedings, any legislation explicitly should preempt State whistleblower claims premised on State statutes and common law."<sup>3</sup> Later, in testimony before the House Subcommittee on Labor-Management Relations on November 16, 1989, Solicitor of Labor Davis reiterated that view and explained the policy reasons for the Department of Labor's positions on the pending legislation:

We must consider the proper balance to strike in the context of a uniform law between the need to protect responsible whistleblowing and the need to ensure that employers retain the right to take legitimate disciplinary actions.

\* \* \*

In defining protected conduct, the proper balance must be struck between the right of an employee to engage in whistleblowing and the right of an employer to control the workplace. We want to be sure that legitimate whistleblowing is protected. We also want to be sure that statutory protections cannot be used to shield employees who are disciplined or discharged for legitimate reasons.

\* \* \*

<sup>3</sup> Letter of Secretary Dole to Senator Metzenbaum, Chairman of the Senate Subcommittee on Labor, August 14, 1989, p. 5a. A copy of Secretary Dole's letter is set forth in the Appendix to this brief.

Although we have other concerns with this legislation, I believe I have provided enough examples to illustrate for you the type of issues that need to be addressed if we are to move from a limited number of narrow and non-uniform Federal whistleblower laws—in each of which the Congress struck a balance, for a specific employment situation, between responsible whistleblowing and the right of employers to take legitimate disciplinary action—to a uniform, broader approach that would apply one set of rules to multiple industries and circumstances.

Statement of Robert P. Davis, Solicitor of Labor, submitted to the House Labor-Management Relations Subcommittee, November 16, 1989, pp. 1, 6, 6-7 (emphasis added).

In enacting Section 210 Congress struck the precise balance the Solicitor supports. Congress, in the interest of nuclear safety, protected nuclear whistleblowers but, equally important, it removed those protections for whistleblowers, such as Petitioner, who threaten the safety of fellow employees and the public by deliberately violating nuclear safety standards. Section 210(g).

In short, Congress intended that nuclear industry employers should not be dissuaded by threats of litigation and liability from disciplining or discharging employees whose deliberate actions create nuclear safety hazards. The Department of Labor agrees. See *Wood and Yeargin Construction Co.*, 79-ERA-3, slip op. at 8-9 (Secretary's Decision, November 8, 1979) (dismissing a § 210 complaint by an employee who had violated safety regulations because "[i]n view of the risk to the plant and public offered by [his] propensities, his discharge was overdue when it occurred"). So do the federal courts:

[A] wrongful discharge action may also have undesirable effects. . . . There is a danger that the always uncertain prospects of litigation will deter employers in [sensitive] industries from legitimate person-

nel decisions, even with respect to those employees whose . . . [actions] in the workplace pose[] a variety of public risks.

*Guy v. Travenol Laboratories*, 812 F.2d 911, 916-917 (4th Cir. 1987).

In light of the foregoing, it is surprising that the Government saw no need to advise this Court of the pending legislation or to alert the Court that the Administration had taken a position favoring preemption for precisely the same reasons that would support a preemption finding in this case.

2. Aside from bringing to the Court's attention the foregoing glaring omission from the Government's brief, we have but a few comments regarding the Government's arguments.

a. First, the Government's brief assumes that Congress' sole purpose in enacting Section 210 was to deter nuclear employers from disciplining or discharging nuclear whistleblowers. Based upon that assumption, the Government concludes that the availability of additional state remedies (including exemplary damages) furthers Congress' single objective. E.g., Government Brief at 7, 9-10, 14, 15. However, the Government cannot simply write off Section 210(g) and the lack of exemplary damages and thereby argue that Petitioner's state action is not preempted.

On the first point, the Government argues that Section 210(g) does not support preemption, but rather that 210(g) provides only an affirmative federal defense in state court actions. Government Brief at 9. In making this argument, however, the Government effectively recognizes that the nuclear safety considerations underlying Section 210(g) are controlling. That being the case, the key question is whether such nuclear safety issues should be considered and decided by the Secretary of Labor in



consultation with the Nuclear Regulatory Commission, or by judges and juries in the 50 states. Clearly, Congress committed those judgments to the Secretary, and there they should exclusively remain.<sup>4</sup>

On the second point, the Government suggests that Congress made no "informed judgment" to withhold exemplary damages because Section 210 does authorize the award of exemplary damages against an employer that fails to abide by a decision of the Secretary of Labor. Brief at 9-10. That argument highlights the Government's failure to appreciate Congress' balanced purposes in enacting Section 210. Congress provided for no exemplary damages to a discharged employee in order to remove that disincentive for an employer to discipline or discharge a nuclear safety violator. The fact that Congress authorized possible exemplary damages against an employer who acts in contempt of a Department of Labor order acts as no disincentive to an employer to discharge a dangerous employee—it acts only as a disincentive to act in contempt of the Department of Labor.

b. Second, and despite the Government's contrary assertion (Brief at 14-15), the fact that the ERA preempts all state activity in the nuclear safety field<sup>5</sup> lends support to the conclusion that Congress intended that

<sup>4</sup> See *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 635-636 (1975):

Although we hold that the union's agreement with Connell is subject to the federal antitrust laws, it does not follow that state antitrust law may apply as well. . . . In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy. . . . State antitrust laws generally have not been subjected to this process of accommodation. . . . Permitting state antitrust law to operate in this field could frustrate the basic federal policies . . . Congress has created. . . .

<sup>5</sup> *Pacific Gas & Electric Co. v. Energy Resources Comm'n*, 461 U.S. 190 (1983).

Section 210 (which the Government concedes is part of the nuclear safety provisions)<sup>6</sup> preempts state actions. It is true, as the Government argues (Brief at 12, n.8), that there may be less reason to find preemption in statutes which established a partnership between the federal government and states—such as cooperative efforts in the field of environmental regulation. On the other hand, where a federal statute, like the ERA, creates no such partnership but, instead, otherwise preempts all state action, there is good reason to conclude that its employee protection provisions which further the basic purpose of the preemptive statute (here, nuclear safety) also preempt state actions by employees and former employees.

c. Third, when the balanced Congressional purposes underlying the enactment of Section 210 are understood, there is no basis for the Government's argued distinction between preempting a state claim for wrongful discharge and a state claim for "intentional infliction of severe emotional distress." Government Brief at 14 n.9. The spectre of either type of state action, with the possibility of punitive damages, deters employers from making disciplinary decisions in furtherance of nuclear safety concerns. Thus, where, as here, the complaining employee premises her entire claim on an alleged retaliation against her whistleblowing activities, there can be no real distinction between that claim and a wrongful discharge claim. Indeed, the Government's brief elsewhere recognizes and argues that the District Court appropriately considered both such claims by English as indistinguishable for preemption purposes. Brief at 16-17 and n.13. And when that distinction is stripped away, even the Government considers that English's state claim in this case may be preempted. Brief at 14, n.9 ("A complaint alleging wrongful termination . . . might raise a more difficult preemption issue than that presented here.").

<sup>6</sup> See Government Brief at 7, 13.



d. Finally, this case does not present a clear conflict with the First Circuit's decision in *Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144 (1st Cir. 1989). The First Circuit noted that there was no Section 210(g) issue of a deliberate safety violator in that case, so that any state law conflict with that subsection was merely speculative. 881 F.2d at 1150. Here, there is no need to speculate. Petitioner's complaint in this case alleges that she deliberately left a radioactive spill in her work place. The potential for state law conflict here is not speculative—it is real. Thus, although the Government attempts to downplay this distinction, it is a distinction that here exists and that the *Norris* decision itself found significant.

In short, and for the additional reasons stated in our Brief in Opposition (at pp. 20-22), there is no conflict in the lower courts sufficient to warrant certiorari. And this is particularly true in light of the Congressional activity now underway which should settle, one way or the other, the preemption question at issue in this case.

#### CONCLUSION

The Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

*Of Counsel:*

BENJAMIN W. HEINEMAN, JR.  
PHILIP A. LACOVARA  
GENERAL ELECTRIC COMPANY  
3135 Easton Turnpike  
Fairfield, Connecticut 06431  
(203) 373-0111

PETER G. NASH  
Counsel of Record  
DIXIE L. ATWATER  
OGLETREE, DEAKINS, NASH,  
SMOAK AND STEWART  
2400 N Street, N.W.  
Fifth Floor  
Washington, D.C. 20037  
(202) 887-0855  
*Counsel for Respondent*

Dated: January 11, 1990

## APPENDIX

APPENDIX

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR  
Washington, D.C.

August 14, 1989

The Honorable Howard M. Metzenbaum  
Chairman  
Subcommittee on Labor  
Committee on Labor and Human Resources  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for our views on S. 436 the "Employee Health and Safety Whistleblower Protection Act." The Administration shares the interest and concern which you and Senator Grassley have regarding the improvement of whistleblower protections for private sector employees subject to Federal safety and health activities.

The Administration has analyzed the record of your hearings on S. 2095 and S. 436, as well as our own experience, and after careful review, the Administration has significant comments and concerns regarding provisions of S. 436. Certain of these comments and concerns are presented here; in addition, we understand that the Department of Justice will submit a separate letter to you, discussing several issues in greater detail. In light of these concerns, the Administration could not support S. 436 in its current form.



### SCOPE OF WHISTLEBLOWER PROTECTION

We believe that coverage of whistleblower protections should be provided only for Federal safety and health activities specifically identified as programs which would be enhanced by such coverage. We are concerned that a generic approach to whistleblower protection, although it is an attractive goal, could result in some unnecessary, duplicative or inappropriate Federal coverage.

Consistent with the principle of tailoring whistleblower protection, Congress has evidenced a clear intent in the past to provide broad whistleblower protection only in connection with certain Federal occupational, environmental and public safety and health statutes. Largely as a result of the broad coverage of the Occupational Safety and Health Act of 1970, whistleblower protection generally is provided in connection with Federal *occupational* safety and health statutes. Moreover, through a number of specific enactments, whistleblower protection generally is provided in connection with Federal *environmental* safety and health statutes. While legislation may be appropriate to eliminate gaps or uncertainties in the occupational and environmental contexts, such gaps should be identified and explicitly covered by any new legislation.

Protection is currently more limited in the broader range of Federal *public* safety and health statutes. Some of the Federal programs subject to these statutes, whose general focus is on preventing hazards to the public, may be furthered by Federal whistleblower protection. Based on our review to date, we believe that the addition of such whistleblower protection could be appropriate in several statutory areas, including:

- 1) aviation safety requirements regulations administered by the Federal Aviation Administration, in order to reassure the public that air travel is safe;
- 2) food safety and sanitation requirements administered by the Food and Drug Administration and

the Department of Agriculture, in order to reassure the public that the quality of the nation's food supply is being maintained;

3) drug safety requirements administered by the Food and Drug Administration, in order to reassure the public that our pharmaceuticals are safe; and

4) the Consumer Product Safety Act and related requirements administered by the Consumer Product Safety Commission, in order to reassure the public that consumer products are safe.

The Administration is willing to explore with your Committee whether it would be useful and practicable to add whistleblower protection to other Federal public safety programs. We believe, however, that limited Federal resources ought to be utilized in those situations where such protection clearly is needed most.

Depending on the final form of any whistleblower legislation, it may be necessary for the Department to seek an increase in the resources available for enforcement. Before we can determine whether we would be able to absorb additional workload within current budget levels or would require more resources, we will need more information on projected activity under the legislation. While we of course want to be sure that the Department can perform the tasks which it is assigned by Congress, any increase necessary for this program may have to be offset by corresponding reductions elsewhere in the Department.

### UNIFORMITY IN ALL WHISTLEBLOWER LAWS FOR A 180-DAY STATUTE OF LIMITATIONS AND PROVIDING DOL WITH SUBPOENA POWER

One of the issues presented by this legislation is the extent to which the protections and procedures of all existing (as well as proposed) safety and health whistleblower programs should be made uniform. We agree with the



Administrative Conference of the United States (ACUS) that legislation is appropriate to ensure that all such programs should have a uniform, 180-day statute of limitations. Some laws cut off the right to file a complaint after only 30 days. We believe that limitation periods shorter than 180 days have proved too short for effective protection of whistleblower rights.

Moreover, we agree that the Department of Labor should be provided with explicit subpoena power, consistent with constitutional constraints, to support its investigative and adjudicative responsibilities under all such programs already administered by this Department. To the extent that S. 436 could be construed as exceeding those constraints, we would urge that the subpoena provisions of the bill be revised. This issue will be discussed in greater detail in the letter to be submitted to you by the Department of Justice.

S. 436 would make these two changes, and only these two changes, to existing Federal safety and health whistleblower programs, and accordingly has our support in this regard.

#### **DUPLICATIVE AND ADDITIONAL WHISTLEBLOWER COVERAGE SHOULD BE DISALLOWED**

It is important that any new legislation be crafted carefully to avoid duplicative or additional whistleblower coverage. Employees currently protected by existing Federal safety and health whistleblower laws, including Federal government employees, should be excluded from coverage by any new program, to avoid conflicting, competing or inconsistent whistleblower protection.

Section 3(2)(B) of S. 436 specifically provides that its provisions only apply to an individual who has "no remedy" under one of the existing safety and health whistleblower protection laws listed in section 3(4) of the bill.

This formulation is very ambiguous. It could, for example, be interpreted to mean that an individual who does not enjoy a specific type of relief under one of the existing statutes could utilize the protections and procedures of S. 436.

As noted above, we oppose creating dual or additional coverage for an employee whose whistleblowing concerns currently are covered by an existing Federal safety and health whistleblower program.

#### **PREEMPTION OF STATE STATUTORY AND COMMON LAW CLAIMS**

S. 436 as drafted would not preempt existing State statutes and common law claims. In fact, Sections 8(b) and 8(c) specifically state that the rights and remedies provided by S. 436 would be in addition to, and not in lieu of, protections provided by State laws or private contractual agreements. The Administration believes that, in order to preclude duplicative State law proceedings, any legislation explicitly should preempt State whistleblower claims premised on State statutes and common law. The Administration agrees that contractual rights and remedies provided to employees which afford *greater* whistleblower protection than is provided by the legislation should not be preempted. To this extent only, the Administration does not oppose the provisions of S. 436 that provide that contractual rights and remedies are in addition to the rights and remedies provided by the legislation.

#### **PROTECTED CONDUCT MUST BE DEFINED CAREFULLY; REFUSAL TO WORK SHOULD BE CIRCUMSCRIBED NARROWLY**

In defining protected conduct, the proper balance must be struck between the right of an employee to engage in whistleblowing and the right of an employer to control the workplace. We want to be sure that legitimate whis-

tleblowing is protected. We also want to be sure that statutory protections cannot be used to shield employees who are disciplined or discharged for legitimate reasons.

For example, there are good reasons to protect the right of employees to refuse to carry out duties assigned by an employer where to do so would cause a serious or life-threatening risk to the employee, to others, or to the public. Indeed, such conduct is protected under a number of existing Federal whistleblower protection statutes, and has been upheld by the Supreme Court of the United States. The parameters of such a right must be circumscribed narrowly so that it is not construed as a right to "work to the rule". We believe S. 436 fails this test, and provides an overly broad definition of the circumstances in which an employee may refuse to work. Consistent with provisions of current whistleblower laws administered by this Department, the Administration believes that the refusal to work must be conditioned on three criteria, including: 1) that there is serious, imminent danger to the employee, other workers or the public; 2) that there is no reasonable alternative to refusal to work; and 3) that the employee, where possible, must have sought and failed to obtain correction of the violation from the employer. The statutory refusal to work right must be limited specifically to the foregoing criteria involving genuine health and safety emergencies. S. 436 goes well beyond those criteria and, accordingly, the Administration opposes the refusal to work provisions in the bill.

#### *CLARIFICATION OF PROTECTED ACTIVITY*

We support inclusion of an explicit requirement that an employee who brings a safety or health hazard to the attention of the employer is protected from retaliation to the same extent as an employee who complains to the Government. Lack of explicit statement of such a right has forced us to litigate this issue under some existing

safety and health whistleblower programs. Also, we are concerned that there is no provision to protect exposure of classified information.

In addition, we support explicit inclusion in the legislation of a provision stating that an employee is not engaging in protected conduct when the employee deliberately causes a violation of a Federal or employer safety or health rule.

#### *A PRIVATE JUDICIAL CAUSE OF ACTION IS NOT APPROPRIATE BEFORE COMPLETION OF ADMINISTRATIVE PROCEDURES*

In order to assure the efficacy of the administrative procedures, we do not believe that complainants should have the right to institute a judicial action to redress the claims which are the subject of pending administrative proceedings. Section 5 of S. 436 allows employees whose cases are pending decision before administrative law judges a "window" in which to file suit in the District Court. No existing health or safety statute providing whistleblower protection affords the complainant with such a judicial cause of action. The majority of the statutes, e.g. the environmental statutes, Mine Safety and Health Act of 1977 ("MSHA") and the Surface Transportation Assistance Act of 1982, ("STAA") provide for an administrative hearing before an administrative law judge or other tribunal with an appeal of the final administrative decision to a federal court of appeals. The alternative existing enforcement procedures provide that the Secretary of Labor exclusively is authorized to file suit on behalf of the complainant under the other statutes administered by the Department, including the Occupational and Safety Health Act ("OSHA") and the Asbestos Hazard Emergency Response Act.

Affording complainants a cause of action before the conclusion of the administrative procedures would not serve the interests of whistleblowers, employers, or the public,



who can benefit from the well understood advantages provided by an administrative procedure. These advantages include, for example, a quicker, less burdensome and less costly procedure than is provided by judicial resolution of claims. Moreover, a private right of action would increase the already heavy burdens of the Federal courts. Based on these considerations, the Administration opposes the private right of action included in S. 436.

*TEMPORARY REINSTATEMENT IS NOT  
APPROPRIATE IN A GENERAL  
WHISTLEBLOWER STATUTE*

Authorizing temporary reinstatement of a complainant before the completion of the full adjudicatory process is a dramatic remedy which is inappropriate in a general whistleblower statute such as S. 436. We do not oppose reinstatement as part of a make whole remedy which can be provided as part of the relief available to a successful complainant at the final conclusion of the adjudicatory process.

Only two of the existing whistleblower statutes administered by the Department, STAA and MSHA, provide a temporary reinstatement remedy. These two statutes address industries which are regulated heavily. The inclusion of a temporary reinstatement remedy in a statute of general application is not supported by these considerations. Accordingly, the Administration opposes the temporary reinstatement remedy included in S. 436.

*RECOMMENDED ADMINISTRATIVE PROCEDURE*

We favor an investigation by trained personnel of complaints of retaliation by whistleblowers, followed by an administrative adjudication process for the resolution of such cases. Based on the Department's experience in administering the majority of the existing whistleblowing statutes, we believe that the administrative procedures followed for the environmental statutes offer the best model. Under these administrative procedures, com-

plaints are filed with the agency, which investigates the allegations, makes findings and attempts to conciliate the claims. Either party dissatisfied with the agency's findings can request a full Administrative Procedure Act ("APA") hearing before an Administrative Law Judge ("ALJ") of the DOL. The ALJ issues a recommended decision, which then is reviewed by the Secretary of Labor. The Secretary's decision represents final agency action, which is then reviewable by the federal courts of appeals under the APA. This process allows for the development of sound, well-considered precedent by administrative law judges and the Secretary of Labor, all of whom are familiar with the applicable law. Additionally, utilizing the administrative procedures allows for the development of the underlying facts with a less significant burden and expense being imposed on the parties.

On a related point, the Administration strongly objects to the requirement in S. 436 that the Department of Labor must intervene on behalf of an employee, where the Department's investigation of the case determines that the employee was the victim of retaliation for protected conduct, even though the employee has retained private counsel. Such a requirement imposes unnecessary duplication of efforts, may extend the administrative procedures and unnecessarily deplete the Department's limited resources.

*THE TIME PERIOD FOR THE ADMINISTRATIVE  
PROCEDURES INCLUDED IN S. 436  
ARE TOO SHORT*

While the Department of Labor recognizes that it has an obligation to act expeditiously in resolving whistleblower cases—or any cases for which it is responsible—we must object to the short time periods for investigations and for Secretarial review of hearing decisions set forth in S. 436. While short time periods may be appealing to the individual with a case, both employees and employers



would be better served if the Department had adequate time to complete a full investigation of each case. The time constraint S. 436 imposes on Secretarial review of administrative law judge decisions is particularly onerous. Accordingly, the Administration must condition its support of any legislation in this area on the provision of time frames which experience has demonstrated are necessary for the proper resolution of these cases.

***THE BURDEN OF PROOF SHOULD BE THE  
"PREPONDERANCE OF THE EVIDENCE"  
STANDARD***

It is essential that we not establish an unreasonable burden of proof for employers in cases of mixed motives: that is, situations in which there may be both an improper motive (retaliation for protected conduct) and a legitimate motive involved in an adverse determination. After an employee demonstrates that an improper motive resulted in prohibited retaliatory action, the burden of proof is on the employer to establish that the adverse action would have taken place even absent the improper motive.

Under existing Federal safety and health whistleblower programs, the employer may avoid its liability by carrying this burden of proof by "a preponderance of the evidence." This is the same standard as the "*Mt. Healthy*" test used by the courts in cases involving conduct protected by the Bill of Rights, the National Labor Relations Act, and by Title VII of the Civil Rights Act. By contrast, S. 436 would establish a "clear and convincing evidence" burden of proof standard. This is too high a standard. This conclusion is supported further by the Supreme Court's recent opinion in *Price Waterhouse v. Hopkins*, in which the Supreme Court explicitly expressed its reservations about imposing a "clear and convincing" evidentiary burden under Title VII. For these reasons, the Administration opposes the "clear and convincing" burden of proof imposed on employers by S. 436.

***PAIN AND SUFFERING AND SIMILAR DAMAGES  
ARE NOT INCLUDED AS PART OF A "MAKE  
WHOLE" REMEDY***

S. 436 would empower the Department of Labor and the courts to order reinstatement, back pay and lost benefits, as well as compensatory damages. These damages are the same as those available under existing whistleblower programs. The Administration does not oppose these damage provisions, based on its understanding that "compensatory damages" do not authorize "pain and suffering" and similar awards.

***PROMPT NOTIFICATION OF THE RESPONSIBLE  
AGENCY***

We support the requirement in any legislation that DOL promptly advise the agency responsible for the administration of a particular Federal safety or health law of the pendency of a whistleblower complaint. We do not agree with the provision provided for in section 7 of S. 436. Under that provision, notification to the concerned agency does not occur until the conclusion of action on the retaliation complaint. This delayed notification will be of little benefit because it may delay that agency's abatement response to the hazard or danger.

\* \* \* \*

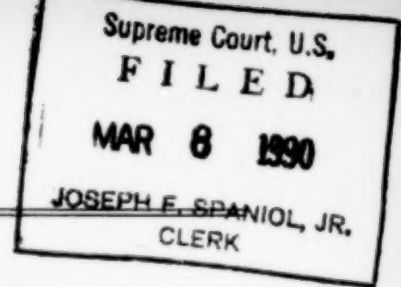
We appreciate the opportunity to comment on these matters, and would be pleased to answer any further questions you may have. The Office of Management and Budget advises that there is no objection to the submission of this letter from the standpoint of the President's program.

Sincerely,

/s/ Elizabeth Dole  
ELIZABETH DOLE

cc: The Honorable Edward Kennedy  
The Honorable Orrin Hatch  
The Honorable James Jeffords  
The Honorable Charles Grassley

(9)  
No. 89-152



In The  
**Supreme Court of the United States**  
October Term, 1989

—◆—  
VERA M. ENGLISH,

*Petitioner,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

—◆—  
**On Writ Of Certiorari To The United States Court  
Of Appeals For The Fourth Circuit**

—◆—  
**JOINT APPENDIX**  
—◆—

M. TRAVIS PAYNE  
EDELSTEIN, PAYNE, & NELSON  
P. O. Box 12607  
Raleigh, NC 27605  
(919) 828-1456

ARTHUR M. SCHILLER  
Attorney at Law  
Suite 430  
1920 N. Street, N.W.  
Washington, DC 20036  
(202) 857-5658  
*Counsel for Petitioner*

CARTER G. PHILLIPS  
SIDLEY & AUSTIN  
1722 Eye Street, N.W.  
Washington, DC 2006  
(202) 429-4000  
*Counsel for Respondent*

=====  
**Petition For Certiorari Filed July 27, 1989  
Certiorari Granted January 22, 1990**  
=====

## TABLE OF CONTENTS

	Page
Docket Entries at the United States Court of Appeals for the Fourth Circuit <sup>1</sup> .....	1
Docket Entries at the United States District Court for the Eastern District of North Carolina .....	4
Complaint.....	7
Amendment to Complaint .....	23
Motion to Dismiss.....	26
Motion to Dismiss the Complaint as Amended.....	28

Note: A number of documents that are relevant to this appeal were printed and filed with the Petition for Certiorari. Pursuant to Rule 33.1, they are not being re-printed in this Appendix. However, for the use and convenience of the Court, the documents and the page at which they may be found in the Appendix to the Petition, are set out below.

TABLE OF CONTENTS OF THE  
APPENDIX TO THE PETITION

Opinion of the Court of Appeals .....	1a
Order of the Court of Appeal Denying Petition for Rehearing.....	4a
Opinion and Order of the District Court.....	6a

---

<sup>1</sup> Plaintiff's appeal was docketed as case number 88-3976. Defendant subsequently cross-appealed. The cross-appeal was assigned case number 88-3982, and was consolidated with the original appeal. Because the docket sheets are identical after the consolidation, only the docket sheets for case number 88-3976 are re-produced here.



## TABLE OF CONTENTS - Continued

	Page
Decision of the Administrative Law Judge in <i>English v. General Electric</i> , 85-ERA-0002 (August 1, 1985) . . . . .	30a
Order of the Nuclear Regulatory Commission in Docket No. 70-1113 (March 13, 1989) . . . . .	57a

GENERAL DOCKET  
U. S. COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

English v. General Electric	88-3976
3/22/88	Civil case docketed.
3/22/88	Record on appeal filed.
3/22/88	Briefing order filed. A/P brief due: May 2, 1988.
3/22/88	Docketing notice issued.
3/24/88	Docketing statement filed by Appellant Vera M. English.
3/25/88	Clerk order filed consolidating case(s) 88-3982 with 88-3976 for briefing and oral argument.
3/25/88	Clerk order filed rescinding briefing order.
3/25/88	Supplement to record on appeal filed.
3/25/88	Cross-appeal briefing order filed. A/P brief due: May 4, 1988.
3/25/88	Docketing notice issued.
3/29/88	Disclosure statement filed by appellant Vera M. English in 88-3976, appellee Vera M. English in 88-3982.
3/31/88	Docketing statement filed by Appellant General Electric Co. in 88-3982.
3/31/88	Disclosure statement filed by Appellee General Electric in 88-3976.
5/4/88	Cross-brief joint appendix filed by Appellant in 88-3976.
5/6/88	Amicus curiae brief filed by Govt. Acc. Proj.
5/6/88	Motion filed by Government Account in 88-3976, Government Account in 88-3982 to file amicus brief.

5/9/88 Response to motion to file amicus brief in 88-3976, 88-3982 requested of Appellee General Electric in 88-3976, Appellant Vera M. English in 88-3976, Appellant General Electric Co in 88-3982, Appellee Vera M. English in 88-3982 on or before May 16, 1988.

5/13/88 Response to motion to file amicus brief in 88-3982, 88-3976, filed by Appellee Vera M. English in 88-3982, Appellant Vera M. English in 88-3976.

5/17/88 Response to motion to file amicus brief in 88-3976, 88-3982 filed by Appellee General Electric in 88-3976, Appellant General Electric Co in 88-3982.

5/19/88 Clerk order filed granting motion to file amicus brief in 88-3976, granting motion to file amicus brief in 88-3982

6/6/88 Cross-brief filed by Appellee in 88-3976, Appellant in 88-3982.

7/11/88 Cross-reply brief filed by Appellant in 88-3976, Appellee in 88-3982.

7/22/88 Motion filed by Appellee General Electric in 88-3976, Appellant General Electric Co in 88-3982 to extend time to file e's cross-reply brief until 8/11/88.

7/26/88 Clerk order filed granting motion to extend time to file e's xrpl brief until: August 11, 1988 in 88-3976, granting motion to extend time to file e's xrpl brief until: August 11, 1988 in 88-3982.

7/29/88 Supplemental authorities (FRAP 28 (j)) filed by Appellant Vera M. English in 88-3976, Appellee Vera M. English in 88-3982.

8/11/88 Cross-reply brief filed by Appellee General Electric in 88-3976, Appellant General Electric Co in 88-3982.

9/15/88 Disclosure statement filed by Government Account in 88-3976, Government Account in 88-3982.

10/18/88 Case calendared for oral argument.

12/5/88 Oral argument heard.

4/3/89 Published per curiam opinion filed.

4/3/89 Judgment order filed. Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Published. DSR, Judge, HEW, Judge, KKH, Judge.

4/17/89 Petition filed by Appellant Vera M. English in 88-2976, Appellee Vera M. English in 88-3982 for rehearing.

4/28/89 Court order filed by DSR, HEW, KKH denying motion for rehearing in 88-3976, denying motion for rehearing in 88-3982, denying motion for suggestion for reh in banc in 88-3976, denying motion for suggestion reh in banc in 88-3982.

5/15/89 Federal Reporter Citation: 871 F.2d 22.

5/22/89 Mandate issued.

8/3/89 Supreme Court notice received of filing of petition for certiorari on 07/27/89. Supreme Court No. 89-152.

---

## PLAINTIFFS

## DEFENDANTS

ENGLISH, VERA M.

GENERAL ELECTRIC  
COMPANY

87-31-CIV-7

## INDEX

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA1987

3/13 COMPLAINT W/JURY DEMAND - Plff. seeks compensatory damages for lost wages & benefits, compensatory damages for medical expenses, punitive damages & costs for wrongful discharge

Summons issued

3/30 DEFT'S MOTION FOR EXT. OF TIME TO FILE RESPONSIVE PLEADINGS

3/30 ORDER - Deft. allowed to & including 5/5/87 to file responsive pleadings

4/29 PLFF'S AMENDMENT TO HER COMPLAINT

5/1 DEFT'S MOTION FOR COURT APPROVAL FOR ENLARGING LENGTH OF SUPPORTING MEMORANDA

5/1 ORDER ON MOTION - Deft. is authorized to file memorandum in support of motion to dismiss not to exceed 50 pages

5/5 DEFT'S MOTION TO DISMISS (RULE 12 (b))

5/5 DEFT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS W/APPENDIX

5/8 DEFT'S MOTION TO DISMISS COMPLAINT AS AMENDED

5/20 PLFF'S MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFT'S MOTION TO DISMISS

5/20 ORDER - Plff. shall have to & including 6/26/87 to respond to motion to dismiss

6/23 PLFF'S MOTION FOR FURTHER EXTENSION OF TIME TO RESPOND TO DEFT'S MOTION TO DISMISS

6/23 PLFF'S MOTION TO ENLARGE LENGTH OF HER BRIEF TO EXCEED 30 PAGES

6/25 ORDER ON EXTENSION OF TIME - Plff. shall have to & including 7/10/87 to file response to motion to dismiss

7/6 ORDER - Plff. is authorized to submit brief not exceeding 50 pages in response to motion of deft. to dismiss

7/13 PLFF'S BRIEF IN RESPONSE TO DEFT'S MOTION TO DISMISS

7/13 PLFF'S APPENDIX ACCOMPANYING HER BRIEF

7/14 Sent for instructions on dispositive motions (Judge Dupree w/file)

7/21/87 REQUEST FOR EXTENSION OF TIME TO FILE REPLY - by deft. up to and through 8/14/87.

7/24/87 ORDER - deft. shall have up to and including the 14 of August 1987 in which to file its reply.

7/28 DEFT'S LETTER REQUEST FOR ORAL HEARING ON MOTION TO DISMISS



8/14 DEFT'S REPLY MEMORANDUM IN SUPPORT OF PRE-ANSWER MOTION TO DISMISS W/APPENDIX

8/14 DEFT'S MOTION TO ENLARGE LENGTH OF REPLY

8/14 ORDER ON MOTION TO ENLARGE - Deft. authorized to file a memorandum in support of its motion to dismiss not to exceed 20 pages

1988

2/12 ORDER ON MOTION TO DISMISS OF DEFT. - Action is dismissed in its entirety & Clerk is directed to enter judgment accordingly (DUPREE, J)

2/12 JUDGMENT - Deft's motion to dismiss granted as to counts 1 & 2 of the complaint pursuant to Rule 12(b)(1) on grounds that Court lacks jurisdiction over the subject matter and on the alternative ground pursuant to Rule 12(b)(6) that plff. has not stated a claim upon which relief can be granted. Counts 3 & 4 of the Complaint are dismissed pursuant to Rule 12(b)(1) on the ground that court lacks jurisdiction subject matter.

3/11/88 PLAINTIFF'S NOTICE OF APPEAL -

3/17/88 MAILED RECORD OF APPEAL TO THE 4TH CIRCUIT - consisting of pleadings, Volume I; index and trans. ltr.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION  
CASE NO: 87-31-CIV-7

VERA M. ENGLISH,	)	
Plaintiff,	)	COMPLAINT
v.	)	FILED
GENERAL ELECTRIC COMPANY,	)	MAR 13 1987
Defendant.	)	

I. STATEMENT OF THE CASE

This is a tort suit for compensatory and punitive damages and other relief for wrongful discharge in violation of a clearly established public policy and intentional infliction of economic and emotional harm by reprisal and punishment inflicted upon plaintiff in violation of the laws of the United States and North Carolina, with respect to her terms and conditions of employment with defendant General Electric Company (GE) for documenting and disclosing to GE management and to the Nuclear Regulatory Commission (NRC), defendant's noncompliance with laws, rules and regulations applicable to defendant GE's Nuclear Fuel Manufacturing Department (hereinafter NFMD), at Wilmington, North Carolina. These laws, rules and regulations are designed to protect employees and the public against nuclear contamination and to assure quality in nuclear fuel products. Defendant's conduct herein complained of is in contravention of the public policy of the laws of the United States and North Carolina, and in defiance of the peace, dignity and legal rights of its citizens, and the welfare and authority of the State.

## II. JURISDICTION

Plaintiff, a natural person and defendant corporation, are citizens of different States and the amount in controversy far exceeds the sum of \$10,000. 28 U.S.C. §1332.

## III. PARTIES

(a) Plaintiff, Mrs. Vera English, a highly competent, and well-trained radiation laboratory technician, was, at all times pertinent hereto, a resident of the State of North Carolina and now resides at 144 Long Ridge Drive, Wilmington, North Carolina 28405.

(b) Defendant, GE, is a corporation organized under the laws of the State of Connecticut with its principal place of business in Fairfield, Connecticut. GE at all times relevant hereto operated, and still operates, a nuclear fuel fabricating facility (NFMD) in Wilmington, North Carolina.

## IV. BACKGROUND

1. NFMD, the facility operated by defendant, General Electric Company (GE), in Wilmington, North Carolina, uses radioactive materials for the purpose of producing nuclear reactor fuel and uranium powder. Simply stated, incoming uranium is converted chemically to a powder which is either then, in a ceramic process, made into pellets, which are assembled into fuel rods and bundles, or the powder is sold to others for the purpose of being made into nuclear reactor fuel.

2. NFMD is subject to the provisions of the Atomic Energy Act of 1954, as amended, 42 USC §2011, *et seq.*

3. Under that Act, GE is required to have a license to operate its NFMD. A license may be issued by the Nuclear Regulatory Commission only after NRC review of the application for a license and the license contains numerous conditions. These license conditions, which include compliance with all provisions of the Atomic Energy Act and NRC regulations are legally binding on licensees such as GE in order to assure adequate protection for the worker and public health and safety.

4. A critical part of the process of producing nuclear reactor fuel or powder at the GE facility was and is the operation of the Chemical Metallurgical Laboratory (Chemet Lab) various departments of which provide metallurgical, environmental, chemical and spectrographic analyses on small uranium samples brought to the Lab from the production areas of the plant. These analyses are intended to assure that the uranium powder and nuclear fuel meet the rigorous quality standards established by the NRC to assure safe operation of nuclear plants using this fuel.

5. Mrs. English was employed at the Chemet Lab as a laboratory technician, at an annual salary as of the time of her departure of \$30,486, plus fringe benefits, from November 13, 1972 until March 15, 1984 when she was involuntarily transferred to a degrading "make work" job from which she was fired on July 30, 1984. During the period of her work in the Chemet Lab, particularly relevant here, Mrs. English's work consisted of quality control, assuring that the mix of uranium in the powder was

accurate. The safe operation of nuclear facilities using this fuel depends upon the accuracy of the mixture of uranium in each fuel pellet.

6. Because the presence of uranium powder at any level of enrichment involves potentially dangerous levels of radioactivity, stringent requirements have been established by the NRC and by GE to protect workers in the Chemet Lab including checking by specially trained personnel known as "Rad Safety Men," using special detection instruments, to detect movable and immovable uranium contamination; self-checking for radiation contamination of persons leaving the laboratory; special hoods and fans to pull off any stray uranium powder in the areas of the Chemet Lab where analyses are performed; and wearing of special lab coats, gloves and safety glasses.

7. It is the duty of all employees of nuclear facilities such as the NFMD to report all violations of safety standards to appropriate supervisory personnel, and, if appropriate, to the NRC. This duty is embodied in 10 CFR Parts 19 and 20, among others, and failure to obey this requirement may result in criminal action against the employee as provided in 42 USC §2273. —

8. The purpose and policy of congress and the NRC in enacting 42 USC §2273 and 10 CFR Parts 19 and 20 was and is to encourage employees of nuclear facilities, such as NFMD to uncover, document, prove and report what employees perceive to be violations of safety requirements by their employer.

9. Prior to March 15, 1984, Mrs. English's complaints to management had been ignored by management

and management had disparaged and derided her as paranoid. They accused her of attempting to perform supervisors' work, for voicing safety and quality concerns, pretended that management observed no violations and demanded that she perform the often essentially impossible task of providing additional proof of any violations she alleged.

#### V. THE WRONGFUL REMOVAL OF MRS. ENGLISH FROM THE CHEMET LAB AND HER SUBSEQUENT WRONGFUL DISCHARGE

10. On February 13, 1984, Mrs. English reported to NRC that many safety hazards and illegal practices were present in the Chemet Lab at NFMD, for which corrective action had not been taken although GE had been made aware by her of similar safety hazards and illegal practices in the Lab.

11. The names of employees making complaints of this type to the NRC are normally expected to be kept confidential.

12. On February 24, 1984, Mrs. English forwarded essentially the same complaints in a written report to Mr. E. A. Lees, the Quality Assurance Manager (later General Manager) of GE's NFMD.

13. Beginning on March 5, 1984, Mrs. English noticed at the beginning of her shift substantial radiation contamination at her work station in the Chemet Lab and in other work areas she used in the lab.



14. On March 5, 6, 7, 8 and 9, Mrs. English spent considerable work time cleaning up radiation contamination at and around her work station left by workers on the preceding shift.

15. On March 5, observing the unusual presence of a Rad Safety man in the Chemet Lab, a phenomenon she had not witnessed for years, Mrs. English called him over to her work bench to see whether he would discover the pile of nuclear contaminated material she had collected and swept to the rear baseboard of her work table. This pile consisted of accumulated drippings from the outside of the vials delivered by the factory to the Chemet Lab for testing. After finishing each tray of vials, the drippings from said vials are customarily brushed by lab technicians to the back of their work tables, and are customarily disposed of by them at the end of their shift. After responding to Mrs. English's summons, the Rad Safety man said her work table was clean. At the end of her shift, Mrs. English cleaned up the pile of contaminated matter which the Rad Safety man had not detected.

16. Finally, on March 10, at the end of her shift that began on March 9, Mrs. English decided that the only way to convince management of the validity of her concerns about the dangerous conditions in the Chemet Lab and of other workers' failure to follow safety procedures, charges she had raised before without GE properly responding, was to identify some of the areas of radiation contamination with red tape (used to mark off radiation hot spots) and have her regular supervisor, Mr. William Lacewell, see the conditions when he and she were next on duty, which would be on the evening of March 12.

Those radiation contamination areas not so marked were cleaned by Mrs. English.

17. On March 12 at the start of the evening shift Mrs. English showed her supervisor, Mr. Lacewell, the marked off areas of contamination in the Chemet Lab. They had not been cleaned by any GE employees using the Chemet Lab between March 10 and March 12. Mrs. English also reported to him the failure of the Rad Safety man to detect contamination on her work bench on March 5, which, to Mrs. English, proved that the Rad Safety man either did not know how to find visible nuclear contamination or did not have an operative detection instrument.

18. Following Mrs. English's discussion with Mr. Lacewell many of the safety problems identified by Mrs. English were fixed and the contamination was cleaned. This work required a work stoppage in the affected areas of the Chemet Lab.

19. In a letter dated March 15, 1984, addressed to Mrs. English, GE charged Mrs. English with several violations of Company and/or NRC requirements, including:

- (1) unauthorized removal of a personal nuclear survey instrument (known as a "frisker") from the entrance to the laboratory for use elsewhere in the plant;
- (2) deliberate contamination of a table;
- (3) failure to clean up contamination, knowing it existed;
- (4) the continued distraction of other laboratory employees; and
- (5) disruption of normal laboratory activities.

20. Mrs. English appealed the charges and all but charge number (3) were dropped because they were deemed demonstrably false or not capable of substantiation.

21. GE concluded that charge number (3) was substantiated and imposed on Mrs. English the following punishment:

- (a) removal from the Chemet Lab;
- (b) bar from entry into the Chemet Lab or from employment in or entry to any "controlled areas" in NFMD;
- (c) indefinite assignment - to menial "make work" in Building "J" and the Central Stores warehouse.

22. Internal management documents establish that the purpose of these measures was to punish Mrs. English for what management termed her "subversive" activity and to prevent Mrs. English from continuing to obtain evidence to prove that management was failing adequately to police compliance with NRC safety and quality regulations.

23. GE's internal investigation of the charges of poor quality control made by Mrs. English in large part substantiated Mrs. English's allegations. However, there was virtually no effort by the GE management fairly to appraise and thoroughly to investigate the validity of concerns Mrs. English raised over Chemet Lab safety.

24. Following delivery of the letter of March 15, 1984: (a) Mrs. English was removed from the Chemet Lab under guard, as if she were a criminal; exposing her to the contempt and ridicule of fellow employees; (b) Mrs.

English was watched constantly, i.e., subjected to surveillance, by a member of management from a desk overlooking hers in Building J; and (c) Mrs. English was isolated from her fellow workers and not even permitted to eat lunch in the company lunch room with them.

25. Mrs. English was subsequently advised on April 30, 1984, that she would have to "bid" for a position in the plant other than in the Chemet Lab and that if none were available within 90 days she would be placed on a "lack of available work" status, a euphemism for being fired.

26. On July 30, 1984, 90 days after she had been put on notice that she would have to "bid" for an open, non-controlled area, position at the plant to stay employed, no such position having been offered to her, Mrs. English was fired by GE. A day before, further to punish and humiliate Mrs. English, management sent her home to get "safety shoes" although plant rules did not require that anyone in the area in which she was working wear safety shoes.

27. This treatment of Mrs. English was clearly discriminatory because at least two shifts of other workers observed the same contamination areas marked off by Mrs. English between March 10 and March 12, without cleaning or reporting it, and no action of any kind (not even an investigation) was undertaken by GE with respect to any workers from those shifts. Similar failures to clean up known contamination and/or to self-monitor for contamination in the past by other employees had also never resulted in the kind and severity of disciplinary treatment meted out by GE to Mrs. English.

28. Indeed, heedless, careless and negligent or deliberate contamination of the work place by other workers, although reliably reported and complained of by Mrs. English in the past, and readily confirmable, was never even investigated (much less punished) by GE management prior to or after July 30, 1984.

29. Management's discriminatory treatment of Mrs. English was motivated by GE's desire to punish her for raising safety concerns, the resolution of which caused, was causing and would continue to cause delay in production at the GE plant, embarrass GE with its principal regulator, the NRC, and encourage other employees to observe, prove and report GE's sloppy and potentially dangerous safety procedures.

30. GE was also motivated by a desire to teach Mrs. English a lesson and make her an example to the rest of the GE work force that GE would not tolerate but would instead severely punish employees who insisted on compliance with safety regulations and reported GE violations to the NRC as required by law.

31. Not only did GE discriminate against Mrs. English, but GE management conspired to fraudulently charge that Mrs. English violated GE safety rules and criminal statutory prohibitions which they knew did not exist or the violation of which they knew did not occur. GE management devised and utilized this fraudulent charge as the pretext for removal of Mrs. English from her prestigious job in the Chemet Lab; transferring her to a degrading "make work" job; foreclosing her from employment and even from entering the Chemet Lab and, when Mrs. English failed to resign, discharged her on

July 30, 1984, because she had exposed and threatened to continue to expose as sham, management's pretended concern with employee and public health and safety in the NFMD.

32. NRC investigated the allegations of Mrs. English through its Region II office in Atlanta, Georgia. Even though this office is now under investigation for systematically downgrading violations of nuclear licensees under its jurisdiction and for failure to vigorously process allegations of wrongdoing by the licensees under its jurisdiction, it nonetheless found a substantial number of the violations alleged by Mrs. English to be valid and ordered GE to take corrective action.

33. But for the courage and persistence of Mrs. English the safety problems in the Chemet Lab would not have come to light and the safety measures now taken to correct some of those problems would never have been taken. Because of the reprisals to which Mrs. English has been subjected, absent full vindication for her by this Court, it is highly unlikely that any other GE employee will press to have the extant safety problems and violations at the plant corrected or to report new or heretofore undisclosed safety problems.

34. If Mrs. English had not reported the safety problems and regulatory violations of which she was aware, she would have violated federal laws and regulations and would have been subject to criminal prosecution.



## VI. THE CONSEQUENCES OF THE WRONGFUL DISCHARGE

35. Subsequent to being fired by GE Mrs. English has been unable to find acceptable employment and has become impoverished.

36. Subsequent to being fired by GE and as a direct result of its deliberate conduct directed against her as described in paragraphs 21 through 31, above, Mrs. English suffers from a severely depressed and emotional condition which has required professional psychiatric treatment.

37. Her examining psychiatrist concluded that she suffers from a severe adjustment reaction coupled with depression and anger ("agitated depression") all associated with and caused by the discriminatory conduct of GE directed against Mrs. English because of her "whistle blowing."

38. On the recommendation of her psychiatrist Mrs. English has received extensive psychotherapy and medication to treat her condition.

39. At the time of the filing of this complaint Mrs. English is financially destitute and unable to support herself although prior to being fired by GE in 1984 she was a well-paid, extremely competent and highly-regarded laboratory technician. Her degraded financial and emotional condition is a direct result of the actions of GE directed against her.

40. As a direct result of the actions of GE described above, plaintiff has paid and/or incurred the following costs:

Past and future pay, including benefits	\$328,645.00
Mrs. English's out of pocket costs and expenses	24,026.62
Psychological Service Fees (only through December 10, 1985, and not including additional amounts incurred since then, claimed here and to be proved at trial)	<u>2,955.00</u>
TOTAL	\$355,626.62

## FIRST CLAIM

41. The allegations of paragraphs 1 to 40 are real-  
leged and incorporated here.

42. Mrs. English's transfer out of the Chemet Lab, assignment to a "make work" job in Building "J", and discharge because of her insistence on reporting safety violations at GE's nuclear facility as she was required by law to do, constitutes a wrongful discharge in violation of the strong public policies embodied in the laws of the United States, which encourage and require safe operation of nuclear facilities and require workers to report potential violations of NRC regulations. These public policies are fundamental to a safe and just society. Mrs. English's wrongful discharge entitles her to compensatory damages from GE, including lost wages and fringe benefits.

## SECOND CLAIM

43. The allegations of paragraphs 1 to 42 are real-  
leged and incorporated here.

44. Mrs. English's discharge in retaliation for her compliance with the law by reporting safety hazards and violations by GE of NRC safety regulations constitutes a gross, wanton and reckless violation of public policy and disregard of her rights, and was done with actual malice entitling her to punitive damages against GE.

### THIRD CLAIM

45. The allegations of paragraphs 1 to 40 are realleged and incorporated here.

46. GE's actions set forth in paragraphs 21 through 31, above, were extreme and outrageous conduct intended to cause Mrs. English emotional distress.

47. The actions of GE have caused Mrs. English mental anguish and severe emotional distress as set forth in paragraphs 36 and 37, above.

48. Mrs. English is entitled to compensatory damages for medical expenses as well as for the pain and suffering engendered by the emotional distress.

### FOURTH CLAIM

49. The allegations of paragraphs 1 to 40 and 46 to 48 are realleged and incorporated here.

50. GE intentionally inflicted emotional distress on Mrs. English as "punishment" for her reporting violations to the NRC and to make an example of her.

51. This intentional conduct was done with actual malice and entitles Mrs. English to punitive damages against GE.

### PRAYER FOR RELIEF

Wherefore plaintiff respectfully requests that the Court:

1. Grant plaintiff a jury trial on all issues so triable.
2. Award her compensatory damages on her First Claim for lost wages and fringe benefits in an amount of at least \$328,645.00, the specific amount to be determined at a trial of this matter.
3. Award her compensatory damages on her Third Claim for medical expenses and pain and suffering in an amount of at least \$1,000,000.00, the specific amount to be determined at a trial of this matter.
4. Award her punitive damages on her Second and/or Fourth Claims in the amount of 5% of the net worth of defendant General Electric Company, the specific amount to be determined at a trial of this matter.
5. Award her pre-judgment and post-judgment interest on all amounts as allowed by law.
6. Direct defendant to remove from its files any and all documents reflecting adversely on plaintiff arising out of her actions on March 5 and 9, 1984; and enjoin defendant from conveying any information about its disciplinary action and ultimate termination of plaintiff to any prospective employers of plaintiff.
7. Award her all costs incurred in pursuing this action, including reasonable expert witness fees and attorney's fees.
8. Grant such other and further relief as to the Court seems just and proper.

This the 13th day of March, 1987.

ATTORNEYS FOR PLAINTIFF

/s/ M. Travis Payne  
M. Travis Payne  
Edelstein and Payne  
P.O. Box 12607  
Raleigh, NC 27605  
(919)828-1456

/s/ Mozart G. Ratner  
Mozart G. Ratner  
4400 Jenifer St., N.W.  
Suite 350  
Washington, D.C. 20015  
(202)362-4060

---

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION

87-31-CIV-7

VERA M. ENGLISH,	)	
Plaintiff,	)	AMENDMENT
	)	[Rule 15(a),
v.	)	F.R.C.P.]
GENERAL ELECTRIC COMPANY,	)	FILED
Defendant.	)	APR 29 1987

Now comes Plaintiff, by and through her undersigned counsel, and hereby amends her Complaint as a matter of right, pursuant to Rule 15(a) of the Rules of Civil Procedure, as follows:

1. Add the following sentence at the end of Paragraph #7 of the Complaint: "The duty to follow such laws and report potential criminal violations, and the public policy upon which it rests, is also embodied in the Constitution of the United States and the Constitution of North Carolina."

2. Substitute the following Paragraph #42 for the paragraph currently numbered 42 in the Complaint:

"42. Mrs. English's transfer out of the Chemet lab, assignment to a "make work" job in Building "J", and discharge because of her insistence on reporting safety violations at GE's nuclear facility as she was required by law to do, constitutes a wrongful discharge in violation of the strong public policies embodied in the Constitution and laws of the United States and the Constitution of



North Carolina, which encourage and require safe operation of nuclear facilities and require workers to report potential violations of NRC regulations and potential violations of criminal laws. These public policies are fundamental to a safe and just society. Mrs. English's wrongful discharge entitles her to compensatory damages from GE, including lost wages and fringe benefits."

This the 29th day of April, 1987.

Attorneys for Plaintiff

/s/ M. Travis Payne  
M. Travis Payne  
Edelstein and Payne  
P. O. Box 12607  
Raleigh, N.C. 27605  
(919) 828-1456

/s/ Mozart G. Ratner  
Mozart G. Ratner  
Suite 600  
5225 Wisconsin Ave., N.W.  
Washington, D.C. 20015  
(202) 362-4062

#### CERTIFICATE OF SERVICE

This is to certify that the foregoing document was this day served upon Defendant by placing it in the United States mail, postage pre-paid, addressed as follows:

William W. Sturges  
Weinstein & Sturges  
810 Baxter Street  
Charlotte, N.C. 28202

This the 29th day of April, 1987.

/s/ M. Travis Payne

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION  
Civil Action No. 87-31-CIV-7

VERA M. ENGLISH,

Plaintiff,

v.

GENERAL ELECTRIC COMPANY,

Defendant.

MOTION TO  
DISMISS  
Rule 12(b)  
F.R. Civ. P.

The defendant moves the Court as follows:

1. To dismiss the First and Second Claims of the plaintiff's complaint for wrongful discharge and punitive damages pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the complaint fails to state a claim against defendant upon which relief can be granted under North Carolina law.

2. To dismiss the First and Second Claims of the plaintiff's complaint for wrongful discharge and punitive damages pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the ground that the claims alleged are state law claims which have been preempted by federal law.

3. To dismiss the Third and Fourth Claims of the plaintiff's complaint for intentional infliction of severe emotional distress and punitive damages pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the complaint fails to state a claim upon which relief can be granted under North Carolina law.

4. To dismiss the Third and Fourth Claims of the plaintiff's complaint for intentional infliction of severe emotional distress and punitive damages pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the ground that the claims alleged are state law claims which have been preempted by federal law.

The grounds for dismissal are more fully set forth in a memorandum in support of this motion served herewith.

This the 5th day of May, 1987.

/s/ William W. Sturges  
William W. Sturges

Weinstein & Sturges, P. A.  
810 Baxter Street  
Charlotte, North Carolina 28202  
(704) 372-4800

OF COUNSEL:

Peter G. Nash  
Dixie L. Atwater  
OGLETREE, DEAKINS, NASH,  
SMOAK AND STEWART  
1200 New Hampshire Avenue, N.W.  
Suite 230  
Washington, D.C. 20036  
(202) 887-0855

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION

VERA M. ENGLISH,	)	Civil Action No.
Plaintiff,	)	87-31-CIV-7
	)	
v.	)	
GENERAL ELECTRIC COMPANY,	)	MOTION TO
Defendant.	)	DISMISS THE
	)	COMPLAINT AS
	)	AMENDED

The defendant shows unto the Court the following:

1. The complaint in this action was filed on March 13, 1987.
2. The complaint was amended by plaintiff under Rule 15(a) of the Federal Rules of Civil Procedure by a document dated April 29, 1987.
3. On May 5, 1987 defendant filed a Motion to Dismiss and a Memorandum in support of that motion.
4. The defendant now moves that the Complaint as Amended be dismissed for the same reasons set forth in its May 5, 1987 Motion to Dismiss and in support thereof adopts its May 5, 1987 Memorandum.

Respectfully submitted, this the 7th of May, 1987.

/s/ William W. Sturges  
William W. Sturges  
WEINSTEIN &  
STURGES, P.A.  
810 Baxter Street  
Charlotte, North Carolina  
28202  
704/372-4800

COUNSEL FOR  
DEFENDANT

OF COUNSEL:

Peter G. Nash  
OGLETREE, DEAKINS, NASH,  
SMOAK AND STEWART  
1200 New Hampshire Avenue, N.W.  
Suite 230  
Washington, D.C. 20036  
202/887-0855



10  
No. 89-152

Supreme Court, U.S.  
**FILED**

**MAR 8 1990**

JOSEPH E. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

—◆—  
VERA M. ENGLISH,

*Petitioner,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

—◆—  
On Writ Of Certiorari To The United States Court  
Of Appeals For The Fourth Circuit

—◆—  
**BRIEF OF PETITIONER  
VERA M. ENGLISH**  
—◆—

M. TRAVIS PAYNE\*  
EDELSTEIN, PAYNE & NELSON  
P.O. Box 12607  
Raleigh, NC 27605  
(919) 828-1456

ARTHUR M. SCHILLER  
Attorney at Law  
Suite 430  
1920 N Street, N.W.  
Washington, DC 20036  
(202) 857-5658

*\*Counsel of Record for Petitioner*

**QUESTION PRESENTED**

Should an employee's well-recognized and well-founded state tort action that does not in any way address issues of nuclear regulation or safety, be pre-empted by Section 210 of the Energy Reorganization Act, 42 USC Section 5851, the so-called nuclear "whistleblowers" statute?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
REPORT OF OPINIONS .....	1
JURISDICTION .....	2
STATUTE INVOLVED .....	2
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	9
ARGUMENT	
I. A FUNDAMENTAL INTEREST OF THE STATE IS ADDRESSED THROUGH THE COMMON LAW ACTION FOR INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS .....	11
II. THE PURPOSE OF SECTION 210 IS TO ENCOURAGE WORKERS AT NUCLEAR FACILITIES TO REPORT PROBLEMS, AND THE TORT FOR INFLECTION OF EMOTIONAL DISTRESS SUPPORTS THAT PURPOSE .....	15
III. THE APPLICABLE LAW OF PRE-EMPTION ...	21
IV. PRE-EMPTION IS NOT FAVORED, AND STATE AND FEDERAL LAWS SHOULD BE HARMONIZED TO AVOID PRE-EMPTION ..	23
V. PRE-EMPTION IS GENERALLY NOT FOUND WHERE TO DO SO WOULD IMMUNIZE CONDUCT TRADITIONALLY RECOGNIZED AS ILLEGAL .....	26
VI. THE LEGISLATIVE HISTORY OF SECTION 210 DOES NOT SUPPORT PRE-EMPTION ...	32

## TABLE OF CONTENTS - Continued

	Page
VII. THERE IS NO CONFLICT BETWEEN A COMMON LAW ACTION FOR INFLECTION OF EMOTIONAL DISTRESS AND SECTION 210, SUFFICIENT TO REQUIRE PRE-EMPTION...	35
A. Section 210(g) Does Not Conflict With A Claim For Intentional Inflection of Emotional Distress .....	38
B. The Absence of Exemplary Damages In Section 210 Does Not Establish A Conflict ....	40
C. The Time Frames In Section 210 Do Not Support An Inference Of Pre-emption ...	42
VIII. REVERSAL OF THE LOWER COURT DECISIONS IS CONSISTENT WITH, AND COMPELLED BY, THE DECISIONS IN <i>PACIFIC GAS &amp; ELECTRIC</i> AND <i>SILKWOOD</i> .....	44
CONCLUSION .....	47



## TABLE OF AUTHORITIES

	Page
CASES	
<i>Alessi v. Raybestos-Manhattan, Inc.</i> , 451 U.S. 504 (1981) .....	24
<i>Arkansas Electric Cooperative v. Arkansas Public Service Commission</i> , 461 U.S. 375 (1983).....	25, 43
<i>Askew v. American Waterways Operators</i> , 411 U.S. 325 (1973) .....	25
<i>Beavers v. Johnson</i> , 122 Ga.App. 677, 145 S.E.2d 776 (1965) .....	34
<i>Belknap, Inc. v. Hale</i> , 463 U.S. 491 (1983) .....	30, 31, 39, 41, 42
<i>Bennett v. City National Bank and Trust Co.</i> , 549 P.2d 393 (Okla.App. 1976) .....	34
<i>California v. ARC America Corp.</i> , 109 S.Ct. 1661 (1989) .....	20, 24, 25, 26, 37, 41
<i>California v. Zook</i> , 336 U.S. 725 (1949) .....	33, 41
<i>California Coastal Commission v. Granite Rock Company</i> , 480 U.S. 572 (1987) .....	43
<i>Chicago and North Western Transportation Co. v. Kalo Brick &amp; Tile Co.</i> , 450 U.S. 311 (1981) .....	24
<i>Cohen v. Lion Products Co.</i> , 177 F.Supp. 486 (D.Mass. 1959) .....	34
<i>Crews v. Provident Finance Co.</i> , 271 N.C. 684, 157 S.E.2d 381 (1967) .....	12, 13
<i>De Canas v. Bica</i> , 424 U.S. 351 (1976) ..	24, 25, 33, 42, 43
<i>Dixon v. Stuart</i> , 85 N.C. App. 383, 354 S.E.2d 757 (1987) .....	13

## TABLE OF AUTHORITIES - Continued

	Page
<i>English v. Whitfield</i> , 858 F.2d 957 (4th Cir. 1988) ...	7, 16
<i>Exxon Corp. v. Governor of Maryland</i> , 437 U.S. 117 (1978) .....	25, 37, 42, 44
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977) .....	19, 29, 30, 31, 36, 39
<i>Florida Lime &amp; Avacado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963) .....	22, 36
<i>Fort Halifax Packing Co., Inc. v. Coyne</i> , 482 U.S. 1 (1987) .....	24, 25
<i>Frishett v. State Farm Mutual Auto Ins. Co.</i> , 3 Mich. App. 688, 153 N.W.2d 612 (1966) .....	34
<i>Goodyear Atomic Corp. v. Miller</i> , 108 S.Ct. 1704 (1988) .....	34
<i>Halio v. Lurie</i> , 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961) .....	34
<i>Harless v. First National Bank</i> , 162 W.Va. 116, 246 S.E.2d 270 (1978) .....	34
<i>Harris v. Jones</i> , 281 Md. 560, 380 A.2d 611 (1977) ....	34
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , 471 U.S. 707 (1985) .....	26, 37
<i>Hogan v. Forsyth Country Club</i> , 79 N.C. App. 483, 340 S.E.2d 116, disc. rev. den., 317 N.C. 334, 346 S.E.2d 140 (1986) .....	17
<i>Huron Cement Co. v. Detroit</i> , 362 U.S. 440 (1960) .....	36
<i>Jones v. Nissenbaum, Rudolph &amp; Sneider</i> , 244 Pa.Super. 377, 368 A.2d 770 (1977) .....	34

## TABLE OF AUTHORITIES – Continued

	Page
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977) . . . . .	24, 36
<i>Kirby v. Jules Chain Stores, Corp.</i> , 210 N.C. 808, 188 S.E. 625 (1936) . . . . .	12, 13, 14
<i>Knierim v. Izzo</i> , 22 Ill.2d 73, 174 N.E.2d 157 (1961) . . . . .	34
<i>Korbin v. Berlin</i> , 177 So.2d 551 (Fla.App. 1965) . . . . .	34
<i>Lingle v. Norge Division of Magic Chef, Inc.</i> , 108 S.Ct. 1877 (1988) . . . . .	31, 32, 41
<i>Linn v. United Plant Guard Workers</i> , 383 U.S. 53 (1966) . . . . .	28, 29, 31, 39
<i>Lyons v. Zale Jewelry Co.</i> , 246 Miss. 139, 150 So.2d 154 (1963) . . . . .	34
<i>Meiter v. Cavanaugh</i> , 40 Colo. App. 454, 580 P.2d 399 (1978) . . . . .	34
<i>Merrill Lynch, Pierce, Fenner &amp; Smith v. Ware</i> , 414 U.S. 117 (1973) . . . . .	25
<i>Metropolitan Life Insurance Co. v. Massachusetts</i> , 471 U.S. 724 (1985) . . . . .	21, 24, 26
<i>Meyer v. Nottger</i> , 241 N.W.2d 911 (Iowa 1976) . . . . .	34
<i>Moorhead v. J. C. Penny Co., Inc.</i> , 555 S.W.2d 713 (Tenn. 1977) . . . . .	34
<i>New York State Department of Social Services v. Du- blino</i> , 413 U.S. 405 (1973) . . . . .	21, 25, 32, 33, 34, 36
<i>Norris v. Lumbermen's Mutual Casualty Co.</i> , 881 F.2d 1144 (1st Cir. 1989) . . . . .	40
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) . . . . .	34
<i>Pacific Gas &amp; Electric Co. v. Energy Resources Com- mission</i> , 461 U.S. 190 (1983) . . . . .	10, 22, 25, 36, 44, 45, 46

## TABLE OF AUTHORITIES – Continued

	Page
<i>Pilot Life Insurance Co. v. Dedeaux</i> , 481 U.S. 41 (1987) . . . . .	21, 33
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) . . . . .	24
<i>Roshto v. Bajon</i> , 335 So.2d 486 (La.App. 1976) . . . . .	34
<i>Samms v. Eccles</i> , 11 Utah 2d 289, 358 P.2d 344 (1961) . . . . .	34
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) . . . . .	27
<i>Savage v. Boies</i> , 77 Ariz. 355, 272 P.2d 349 (1954) . . . . .	34
<i>Savage v. Jones</i> , 225 U.S. 501 (1912) . . . . .	36
<i>Sheltra v. Smith</i> , 136 Vt. 472, 392 A.2d 431 (1978) . . . . .	34
<i>Silkwood v. Kerr-McGee Corp.</i> , 667 F.2d 908 (10th Cir. 1981) . . . . .	46
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) . . . . .	10, 22, 23, 41, 46, 47
<i>Stanback v. Stanback</i> , 297 N.C. 181, 254 S.E.2d 611 (1979) . . . . .	13
<i>State Rubbish Collectors Ass'n v. Siliznoff</i> , 38 Cal.2d 330, 240 P.2d 282 (1952) . . . . .	34
<i>Turman v. Central Billing Bureau, Inc.</i> , 279 Or. 443, 568 P.2d 1382 (1977) . . . . .	34
<i>Union Brokerage Co. v. Jensen</i> , 322 U.S. 202 (1944) . . . . .	25, 45
<i>United Automobile Workers of America v. Russell</i> , 356 U.S. 634 (1958) . . . . .	20, 28, 31, 39, 41
<i>United Construction Workers v. Laburnum Construc- tion Corp.</i> , 347 U.S. 656 (1954) . . . . .	21, 27, 28, 31, 39, 41, 42

## TABLE OF AUTHORITIES - Continued

Page

<i>Watson v. Franklin Finance Co.</i> , 540 S.W.2d 186 (Mo. App. 1976) .....	34
<i>Wiggins v. Moskins Credit Clothing Store, Inc.</i> , 137 F.Supp. 764 (E.D.S.C. 1956) .....	34
<i>Wisconsin Department of Industry v. Gould, Inc.</i> , 475 U.S. 282 (1986) .....	27
<i>Woodruff v. Miller</i> , 64 N.C. App. 364, 307 S.E.2d 176 (1983) .....	13

## FEDERAL STATUTES

Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851 .....	<i>passim</i>
42 U.S.C. § 2021(k) .....	22

## STATE STATUTES

N.C. Gen. Stat. § 95-25.20 .....	19
N.C. Gen. Stat. § 95-130(8) .....	19
N.C. Gen. Stat. §§ 96-15.1 and 15.2 .....	19
N.C. Gen. Stat. § 97-6.1 .....	19
N.C. Gen. Stat. § 143-422.2 .....	18
N.C. Gen. Stat. Chapter 168A .....	19

## LEGISLATIVE MATERIALS

H. Conf. Rep. 95-1796, 95th Cong., 2d Sess. (1978) ....	15
S. Rep. No. 95-848, 95th Cong., 2d Sess. (1978) ...	15, 38

## TABLE OF AUTHORITIES - Continued

Page

## TREATISES, PERIODICALS, AND REPORTS

<i>Restatements of Torts, Second</i> .....	12, 14
<i>2A Sutherland Statutory Construction</i> , Section 50.05 (4th Ed. 1984) .....	35



No. 89-152

---

In The  
**Supreme Court of the United States**  
October Term, 1989

---

VERA M. ENGLISH,

*Petitioner,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

---

On Writ Of Certiorari To The United States Court  
Of Appeals For The Fourth Circuit

---

BRIEF OF PETITIONER  
VERA M. ENGLISH

---

**REPORT OF OPINIONS**

The Order of the District Court is reported at 683 F.Supp. (E.D.N.C. 1988). It is reproduced in the Appendix to the Petition for Certiorari beginning at page 6a. The Opinion of the Court of Appeals is reported at 871 F.2d 22 (4th Cir. 1989). It is reproduced in the Appendix to the Petition beginning at page 1a.

## JURISDICTION

The Opinion of the Court of Appeals was decided and entered on April 3, 1989. A Petition for Rehearing and Suggestion for Rehearing *en banc* was denied and entered on April 28, 1989. (Pet. App. 4a) Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

---

## STATUTE INVOLVED

Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, the Employee Protection or "whistleblower" provision of the Atomic Energy Act, is the statute relied upon by the lower courts in finding that Ms. English's common law tort action for intentional infliction of emotional distress is pre-empted. That statute was set out in full at the beginning of the Petition for Certiorari. As it is somewhat lengthy, it is set out in the Appendix to this Brief, rather than here.

---

## STATEMENT OF THE CASE

Vera English was born in Maine in 1925. She grew up in that state, received training in the medical field, and worked there as a licensed practical nurse for a number of years. She also received training in medical laboratory techniques, was certified as a medical technologist, and worked in the medical field.

In 1960 Ms. English moved with her husband to Wilmington, North Carolina. From 1960 to 1972 she

worked in a variety of laboratory positions in medical and technical facilities. During this period she received additional training and education in the field of chemistry and laboratory procedures. In November, 1972, she was hired by Defendant General Electric (G.E.) to work in the Chemet Lab at its Wilmington nuclear fuel processing facility, performing chemical analyses on radioactive materials placed in nuclear fuel rods, to assure the quality of the materials.

The radioactive materials that Ms. English worked with presented a substantial safety hazard to her and her co-workers. They also presented substantial hazards to the general public, first if they got out of the plant and contaminated areas in and around Wilmington; and, second once they were incorporated into nuclear fuel rods and placed in nuclear power plants, if the material and rods were substandard.

Being concerned about the hazards these radioactive materials presented, prior to 1984 Ms. English had reported a number of safety and quality concerns, both to management personnel of Defendant as well as to officials of the Nuclear Regulatory Commission (NRC). (Pet. App. 33a) Those complaints had been largely ignored and Ms. English had been disparaged and derided as paranoid by officials of Defendant for making such complaints. These same officials demanded that she provide additional proof of any violations she alleged. (Complaint ¶ 9; J.A. 11) In February, 1984, Ms. English again reported safety hazards and illegal practices to the NRC as well as to management personnel. (Complaint ¶ 10 & 12; J.A. 11)

Following these complaints Ms. English continued to observe lax safety procedures as well as radiation contamination which had been left by other workers about her workplace. (Complaint ¶ 13, 14 & 15; J.A. 11-12) Finally on March 10, 1984, Ms. English decided that the only way to convince management personnel of the legitimacy of her concerns was to leave some of the contamination that other employees had left at her work station, so that she could show it to her supervisor. As her supervisor would not be on duty with her until March 12, 1984, she marked some of the contamination with red tape and left it, cleaning up the remainder of the contamination she had found. (Complaint ¶ 16 & 17; J.A. 12-13) As a result of Ms. English's complaints and her persistence, work in the lab was ultimately stopped for a clean up. (Complaint ¶ 18; J.A. 13)

From the time that Ms. English marked the contamination on March 10th, until she was able to show it to her supervisor on March 12th, several other shifts worked in the Chemet Lab. None of the employees on any of the other shifts cleaned up the contamination or brought it to the attention of supervisors. (Complaint ¶ 17; J.A. 13) In spite of the fact that employees on at least two other shifts had observed the contamination and failed to clean it up, no action of any kind was undertaken by Defendant with respect to any workers on those shifts. (Complaint ¶ 27; J.A. 15)

On March 15, 1984, Ms. English was falsely charged by Defendant with five violations of company or NRC requirements. (Complaint ¶ 19; J.A. 13) At that time she was removed from the Chemet Lab under guard as if she were a criminal [Complaint ¶ 24(a); J.A. 14] After an

internal company appeal, all charges against Ms. English were dropped except the claim that she failed to clean up radiation contamination. (Complaint ¶ 20; J.A. 14) On the strength of that one allegation, and without taking disciplinary action against other workers who had observed the same contamination, Ms. English was permanently removed from her position in the Chemet Lab, given a menial "make-work" position, and barred from any controlled areas in the plant. (Complaint ¶ 21; J.A. 14)

On April 30, 1984, Ms. English was advised by Defendant that she would have to bid for any suitable position in the plant that became available in a non-controlled area, and that if she did not obtain such a position within 90 days, she would be discharged. As no such position became available within the time limits set by Defendant, Ms. English was discharged on July 30, 1984. (Complaint ¶ 25 & 26; J.A. 15) During a period of at least four and a half months leading up to her discharge, Ms. English was humiliated and harassed, never given any meaningful work, subjected to requirements and "rules" that were not applied to other employees, placed under constant surveillance by management, and completely isolated from her fellow employees to the point of not even being allowed to eat her lunch in the company lunch room with fellow workers. [Complaint ¶ 5, 19, 21(c), 24(b), 24(c) & 26; J.A. 9, 14, 15]

As a result of Defendant's treatment of Plaintiff before her discharge, Ms. English suffered and continues to suffer from a severely depressed and emotional condition. (Complaint ¶ 36, 37 & 38; J.A. 18) Although she has



made diligent efforts to find other comparable employment, her efforts have been unsuccessful, causing her to become impoverished. (Complaint ¶ 35; J.A. 18)

Following her discharge, Ms. English filed a complaint with the Department of Labor on August 24, 1984, pursuant to Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. (Pet. App. 31a)<sup>1</sup> The Department of Labor conducted an initial investigation and concluded that G.E. had discriminated against Ms. English. (Pet. App. 31a) Both G.E. and Ms. English appealed that determination, and after an extensive hearing before an Administrative Law Judge, a decision favorable to Ms. English was issued on August 1, 1985. (Pet. App. 30a)

The Administrative Law Judge concluded that G.E.'s "witnesses were not believable in attributing the discipline" imposed on Ms. English to safety considerations aroused by Ms. English's so-called "'deliberate' violation of the clean-up rule." (Pet. App. 42a-43a) The Judge found that "The one rule that Mrs. English technically violated . . . was a pretext for getting rid of an employee who would not stop reporting violations to NRC." (Pet. App. 43a)

In addressing the defense asserted by G.E. that Ms. English had violated safety rules and should not be entitled to the protection afforded by Section 210, the Judge concluded:

<sup>1</sup> Although the NRC regulates all matters of radiation and nuclear safety, Congress gave the responsibility for implementing and enforcing Section 210 to the Secretary of Labor. 42 U.S.C. § 5851(b).

I do not consider that Mrs. English deliberately caused a violation [as required by Section 210(g)] under the circumstances of this case. . . . Her outlining of the results of some other person's negligence and failure to clean up was in effect, at the same time, a notice to management and a warning to fellow workers of the visible contamination. . . . Mrs. English, as heretofore stated, knew that she could expect no credence to her complaints without tangible evidence. In demonstrating the malfeasance of others, she took the only means available to provide visible proof to support her past and immediate allegations. . . . This was not an act done deliberately to invoke "whistleblower" protection, rather it was a means of reporting violations, albeit unorthodox.

(Pet. App. 44a-45a) As the Judge pointed out, the company's contentions would allow G.E. to "have it both ways"; i.e., to insist on visible proof of an alleged violation, while at the same time requiring employees to eradicate all such proof or face discipline and discharge, thereby "defeating the purpose of the act." (Pet. App. 44a-45a)

The Administrative Judge ordered Ms. English reinstated and awarded her substantial damages (Pet. App. 55a). However, that order was overturned by the Secretary of Labor on January 13, 1987, on the grounds that Ms. English's complaint was untimely filed. The ruling, at least with respect to her discharge, that Ms. English's Section 210 complaint was untimely filed has been affirmed by the Fourth Circuit. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988).

This action was filed on March 13, 1987, in the United States District Court for the Eastern District of North

Carolina. It is a diversity action in which Ms. English asserted tort claims under North Carolina law for wrongful discharge and intentional infliction of emotional distress. Ms. English also asserted claims for punitive damages associated with each of the two tort claims, seeking 5% of Defendant's net worth. (J.A. 21) On or about May 5, 1987, without filing an answer, Defendant moved to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6). (J.A. 23)

On February 12, 1988, the Honorable F.T. Dupree, Jr. entered an Order ruling on Defendant's motion. In that Order Judge Dupree concluded that Plaintiff had not stated a good cause of action for wrongful discharge, and granted Defendant's motion pursuant to Rule 12(b)(6) with respect to that claim (Pet. App. 25a); however, Judge Dupree concluded that Plaintiff *had* stated a good cause of action for intentional infliction of emotional distress, and denied Defendant's motion pursuant to Rule 12(b)(6) with respect to that claim. (Pet. App. 27a) Judge Dupree also analyzed the impact of Section 210 of the Energy Reorganization Act and concluded that that provision was an exclusive remedy for Ms. English, pre-empting all of her state tort claims. He therefore granted Defendant's motion pursuant to Rule 12(b)(1) with respect to both of Plaintiff's tort claims. (Pet. App. 23a, 28a-29a)

From this Order and Judgment Plaintiff filed a timely notice of appeal to the Fourth Circuit Court of Appeals, pursuing an appeal solely with respect to her claim for intentional infliction of emotional distress. Defendant cross-appealed with respect to Judge Dupree's ruling that Plaintiff had stated a good cause of action under North Carolina law for infliction of emotional distress. On April

3, 1989, the Fourth Circuit issued its decision. It rejected Defendant's cross-appeal and affirmed the ruling that Ms. English had stated a good cause of action for intentional infliction of emotional distress. However, the Court also affirmed the ruling that Ms. English's tort claim was pre-empted by the "whistleblower" provisions of the Energy Reorganization Act, 42 USC § 5851 (Pet. App. 3a) The decision of the Court of Appeals was a *per curiam* opinion, and did not elaborate on the rulings of the District Court.

On April 14, 1989, Ms. English filed a timely Petition for Rehearing with the Fourth Circuit. By order of April 28, 1989, that Petition was denied. (Pet. App. 5a) A Petition for Writ of Certiorari was filed with this Court on July 27, 1989. That Petition was granted on January 22, 1990.

---

## SUMMARY OF ARGUMENT

Proper application of this Court's standards for finding the implied pre-emption of state common law actions by federal statutes leads to the conclusion that the decisions of the lower courts should be reversed. Those decisions ignored the teachings of this Court that pre-emption of state law is not favored, that the intent of Congress to pre-empt state laws must be clear and compelling, and that the courts need to respect the principle of federalism by harmonizing state and federal actions where possible, rather than looking for "conflicts" as an excuse to pre-empt the state law. In addition, the decisions of the lower courts ignored the requirement of this



Court that if pre-emption is to be inferred by conflicts between the state and federal actions, those conflicts must be actual and substantial, and not just hypothetical and speculative. As there is no compelling evidence of a Congressional intent to pre-empt common law tort actions, and there are no substantial and actual conflicts between Section 210 of the Energy Reorganization Act and a common law action for intentional infliction of emotional distress, the rulings of the courts below should be reversed.

The holding of this Court in *Pacific Gas & Electric Co. v. Energy Resources Commission*, 416 U.S. 190 (1983), that state regulation may affect nuclear installations, as long as the purpose is something other than nuclear or radiation safety, also requires reversal of the lower courts' decisions. Likewise, the recognition in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), that an award of punitive damages arising out of lax radiation controls and resulting radioactive contamination of an employee, does not require pre-emption, also compels reversal in this case.

The Congressional purpose underlying Section 210 was to encourage nuclear employees to come forward with information about problems at the facilities in which they worked, and to give such employees added protection. State common law actions, like the claim for intentional infliction of emotional distress by Ms. English, support this purpose. If such common law actions are to be pre-empted by Section 210, the result will be that employees concerned about nuclear safety will actually have less protection, and will be less likely to come forward with their information, than if Section 210 had

not been enacted. Thus pre-empting the common law action for intentional infliction of emotional distress in this case contradicts the purpose of Congress in enacting Section 210 of the Energy Reorganization Act, and for this reason also the decisions below should be reversed.

---

## ARGUMENT

### I. A FUNDAMENTAL INTEREST OF THE STATE IS ADDRESSED THROUGH THE COMMON LAW ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Vera English's claim before the Court is not that she was wrongly discharged, rather it is that officials of Defendant intentionally and maliciously subjected her to uncivilized conduct for a period of at least some four and a half months before she was finally discharged.<sup>2</sup> The outrageousness of this conduct is shown by the fact that Defendant specifically argued at the trial before the Department of Labor Administrative Judge, "... that Mrs. English was a high-strung, nervous woman with marked and emotional reactions ...". (Pet. App. 41a) In fact, this was the "chief defense" of Defendant at that hearing. *Id.* That Defendant, knowing Ms. English to be a "high-strung, nervous" individual, would subject her for a period of some four and one half months to the type of conduct alleged in the complaint, indicates the malicious and outrageous character of Defendant's actions that

---

<sup>2</sup> Both the District Court (Pet. App. 27a) and the Court of Appeals (Pet. App. 3a) concluded that Petitioner stated a good cause of action for intentional infliction of emotional distress under North Carolina law.



Plaintiff seeks to remedy in this action. As set forth in the *Restatement of Torts, Second*:

The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is particularly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become *heartless, flagrant, or outrageous* when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.

*Restatement*, § 46, Comment f (emphasis added).

Not only has Defendant seemingly admitted the intentional and malicious nature of its conduct, there is also little question but that Defendant's actions resulted in the infliction of serious emotional distress on Ms. English. Thus the Administrative Judge found that Ms. English suffered emotional problems as a "... cumulative effect of various stressful occurrences that [she] experienced during her employment with Respondent." (Pet. App. 39a) As a result, she was awarded \$70,000.00 in compensatory damages for "humiliation and mental suffering". (Pet. App. 55a)

North Carolina has recognized claims for emotional distress damages at least since 1936. In *Kirby v. Jules Chain Stores, Corp.*, 210 N.C. 808, 188, S.E. 625 (1936), the defendant's agent verbally abused the plaintiff in a profane and malicious manner on at most two occasions. These actions were found sufficient to entitle the plaintiff, who was seven months pregnant at the time, to damages. Similarly in *Crews v. Provident Finance Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967), the plaintiff alleged that she was verbally abused on one occasion by the defendant's

agent, and that she became angry and upset as a result of this abuse. Again, these facts were found sufficient to support the plaintiff's claims for compensation. Although the decisions in *Kirby* and *Crews* do not expressly state that they are recognizing claims for infliction of emotional distress, this was expressly recognized in a discussion of those cases in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611, 622 (1979). Claims for the intentional infliction of emotional distress have now been recognized in North Carolina in a variety of contexts, including the employment situation. *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987).

The interest of North Carolina protected through the tort of intentional infliction of emotional distress is, quite simply, the maintenance of civilized and humane social interactions. This interest is most clearly stated in *Woodruff v. Miller*, 64 N.C. App. 364, 307 S.E.2d 176, 178 (1983).

Fortunate it is for our people and society that such maliciously destructive and disruptive conduct is regarded as extreme and outrageous - rather than normal and acceptable - and that our law provides an orderly way for the community to disapprove of it and compensate those victimized by it.<sup>3</sup>

<sup>3</sup> *Woodruff* involved the reinstatement of a jury verdict in the plaintiff's favor by the court, following the entry of judgment notwithstanding the verdict in the defendant's favor by the trial court. The defendant in *Woodruff* had obtained 30-year-old court documents showing that the plaintiff had been convicted of a minor crime as a result of a prank that he participated in with some other college boys. The defendant then circulated and posted those records throughout the community, causing the plaintiff great embarrassment and humiliation, as well as exacerbating a pre-existing medical condition.

Recognizing a common law action for intentional infliction of emotional distress is not an attempt by North Carolina to regulate nuclear power or radiation safety. It is not even an attempt to specifically regulate employee-employer relations as Section 210 does. Rather it is an attempt to assure civil and acceptable treatment of one member of the community by another, such that society will not be disrupted. It is available to all residents of North Carolina, and applies to the whole gamut of social interactions and experiences.

North Carolina is hardly alone in protecting and encouraging civilized social interactions through the recognition of a tort for intentional infliction of emotional distress. Essentially all of the other states have, likewise, moved to protect and encourage this interest by the recognition of the tort. *See, Restatement of Torts, Second, § 46, and subsequent appendices.*

The interest of the State in this case has nothing whatsoever to do with nuclear energy or nuclear power. Indeed, protection from the malicious and intentional infliction of emotional distress was recognized substantially before issues of nuclear technology were addressed by Congress.<sup>4</sup> It certainly constitutes a fundamental interest of the states, rooted in the necessity to police and control anti-social behavior. It is an interest that should not be recognized as pre-empted by this Court absent the

<sup>4</sup> The decision in *Kirby, supra*, was issued in 1936. The first sustained nuclear chain reaction was carried out on a squash court at the University of Chicago in 1942. The first atomic explosion occurred at Alamogordo, Nevada in 1945. Congress passed the Atomic Energy Act in 1954.

most clear intent by Congress to engage in such pre-emption.

## II. THE PURPOSE OF SECTION 210 IS TO ENCOURAGE WORKERS AT NUCLEAR FACILITIES TO REPORT PROBLEMS, AND THE TORT FOR INFLECTION OF EMOTIONAL DISTRESS SUPPORTS THAT PURPOSE

When Congress enacted Section 210 of the Energy Reorganization Act, the so-called "nuclear whistleblower's act", it indicated that it intended "to provide protection to employees of Commission licensees, applicants, contractors, or subcontractors from discharge or discrimination for taking part or assisting in administrative or legal proceedings of the Commission". H. Conf. Rep. 95-1796, 95th Cong., 2d Sess. p. 16 (1978). Congress also indicated that it wanted to insure that employees with knowledge of possible problems would notify appropriate authorities to "help assure that employers do not violate requirements of the Atomic Energy Act." S. Rep. No. 95-848, 95th Cong., 2d Sess. p. 29 (1978). Indisputably the purposes of Section 210 are furthered where employees retain the opportunity to seek redress for injuries caused by an employer's intentional infliction of emotional distress. With common law remedies available to an employee in addition to the remedies of Section 210, employers will find less incentive to devise mechanisms and defenses to evade the reach of Section 210, since the common law consequences will still remain.<sup>5</sup>

<sup>5</sup> A "mechanism to evade the reach of Section 210" would be the notification of an employee of likely discharge some months in the future.

(Continued on following page)



If Respondent's and the lower courts' view of the pre-emptive effect of Section 210 is sustained, the wrongly-motivated employer would find less risk in retaliating

---

(Continued from previous page)

while at the same time having officials and representatives of the company behave as if they are vigorously attempting to find the employee other work with the company, and perhaps even representing that they expect to find the employee other work before the termination date. This is exactly what happened to Ms. English. *English v. Whitfield*, 858 F.2d 957, 960 (4th Cir. 1988). Like Ms. English, most employees would undoubtedly take the company's representations about expecting to find the employee other work, as being in good faith. However, under the rationale of the Fourth Circuit in *Whitfield*, an employee who accepts the representations of a company in good faith will be barred from bringing a Section 210 action if they are discharged, because of the 30 day filing deadline in the statute. Indeed, the Fourth Circuit established a "bright line" rule that even where an employer takes steps to maintain and confirm an employee's hope that other work would be found and they would not be terminated, such action will still not estop the employer from asserting the 30 day deadline of Section 210 "... absent some indication that the promise was a quid-pro-quo for the employee's forbearance in filing a claim." *Id.* at 963. Thus a nuclear employer now has a relatively simple mechanism for probably avoiding all liability to an employee who reports possible problems to appropriate officials. All the employer need do is notify the employee in writing that they will be fired several months from now, but then take all steps to reassure the employee that other work will certainly be found and they probably will not be fired, as long as those steps do not reach the level of an express "quid-pro-quo". Quite obviously if G.E. is also successful in the present appeal and Ms. English is denied any possibility of a common law recovery, then nuclear employers will have a complete, fool-proof mechanism for avoiding any liability whatsoever to employees who engage in the type of activity that Congress sought to encourage in Section 210.

against a safety-conscious employee, and that employee and other like-minded employees would be more reluctant to come forward with safety concerns. Indeed, under Respondent's contention that Section 210 absolutely pre-empts all other remedies that might be available to nuclear whistleblowers, those employees actually have less protection than they had before Congress enacted Section 210.

Two hypotheticals illustrate the situation. First, assume that Ms. English does not report any problems to management or the NRC, but is still subjected to the same outrageous conduct alleged in her Complaint. The infliction of emotional distress in this instance perhaps arises out of a situation in which she had spurned the sexual advances of a manager. Ms. English would then certainly have a common law action for infliction of emotional distress available to her. *See, e.g., Hogan v. Forsyth Country Club*, 79 N.C.App. 483, 340 S.E.2d 116, *disc. rev. den.*, 317 N.C. 334, 346 S.E.2d 140 (1986). Thus you could have two similarly situated employees, working in the same plant, experiencing essentially identical outrageous conduct and harassment, yet because of slightly different motives behind the outrageous conduct, one of those employees has a common law tort action, while the other one has no remedy.

A second example might involve two very similarly situated employees, one working in a nuclear facility and the other working in a non-nuclear facility that is not covered by any of the other federal "whistleblower" statutes. Both employees engage in the socially praiseworthy activity of reporting potential problems that exist at their



plants to appropriate government officials, and both individuals are then subjected to identical outrageous conduct and harassment. The employee at the nuclear plant, under the lower courts' ruling in this case, has no common law remedy for the outrageous conduct and harassment that she or he suffers, while the other employee in an identical situation except in a slightly different industry, has the full panoply of common law remedies available to him or her.

The decision of the lower courts in this matter actually has even more disturbing consequences. There is no clear line of demarcation to limit the pre-emption of Section 210 recognized below. If, rather than subjecting Ms. English to an emotional and mental assault, as Respondent's officials did here, they instead decided to retaliate against Ms. English for her activities by hiring some "thugs" and actually *physically* assaulting her, the decision below leaves her with no remedy for her injuries and medical bills. Nothing in the District Court's opinion suggests a way to distinguish a common law tort for assault from a common law tort for intentional infliction of emotional distress.<sup>6</sup> Thus, even though this Court has

---

<sup>6</sup> There is also nothing in the District Court's opinion to distinguish the pre-emption of a common law tort from the pre-emption of a state statute. Under the District Court's rationale, particularly its finding of hypothetical conflicts with Section 210 (Pet. App. 19a-21a), employees at nuclear facilities in North Carolina may be denied the protection of at least the following statutes:

N.C.Gen.Stat. § 143-422.2: prohibition against discrimination in employment on the basis of race, religion, color, national origin, age or sex.

(Continued on following page)

held that "Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence . . ." [*Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 299 (1977)], that is certainly what the lower courts' decision in this case will do for employers in the nuclear field.<sup>7</sup>

The hypotheticals set forth here by Petitioner are not so "far-fetched", as this Court has relied on similar

---

(Continued from previous page)

N.C.Gen.Stat. § 97-6.1: protection from retaliation for filing a worker's compensation claim.

N.C.Gen.Stat. § 95-130(8): protection from retaliation for filing a complaint under the North Carolina Occupational Safety and Health Act.

N.C.Gen.Stat. § 95-25.20: protection from retaliation for filing a complaint under the North Carolina Wage and Hour Act.

N.C.Gen.Stat. §§ 96-15.1 and 15.2: protection from retaliation for being a witness in an unemployment compensation hearing.

N.C.Gen.Stat. Chapter 168A: protection from discrimination in employment on the basis of being handicapped.

While the lower court's decision does not expressly pre-empt the state laws cited above, it is easy to construct hypothetical situations involving each of these statutes that might possibly conflict with the provisions of Section 210, and thus support pre-emption under the lower court's ruling.

<sup>7</sup> One wonders if nuclear employers could also successfully assert this alleged broad pre-emptive effect of Section 210 in the state criminal actions that might be brought following a physical assault on a safety-conscious employee?

hypotheticals in rejecting claims for pre-emption. Thus in *United Automobile Workers of America v. Russell*, 356 U.S. 634 (1958), where the plaintiff only asserted common law tortious interference with his employment, this Court posed the following hypothetical to explain the extreme consequences that could result if pre-emption were found.

The situation may be illustrated by supposing, in the instant case, that Russell's car had been turned over resulting in damage to the car and personal injury to him. Under state law presumably he could have recovered for medical expenses, pain and suffering and property damages.

356 U.S. at 645-646. Had this Court held the tort claims actually at issue in *Russell* to be pre-empted, claims arising in a similar situation but actually involving physical injury and suffering would also have been pre-empted. See also, *California v. ARC America Corp.*, 109 S.Ct. 1661, 1667 (1989). (Using the Court of Appeals' logic would lead to the pre-emption of any state-law claims against antitrust defendants.)

If, as Petitioner strongly believes, it was Congress' intent to supplement and improve the remedies available to nuclear whistleblowers when it enacted Section 210, the decision of the lower courts, as shown by the hypotheticals above, has completely subverted that intent. Given the broad pre-emptive effect accorded Section 210 by the decision below, nuclear employees who come forward with information about problems are now legally worse off than they were before the enactment of Section

210. Such an irrational and unfortunate result should not be allowed to stand.<sup>8</sup>

### III. THE APPLICABLE LAW OF PRE-EMPTION

The easiest case for pre-emption is that in which Congress has expressly stated in the statute that it has pre-empted the area. See, e.g., *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). However, there is no such express pre-emption provision to be found anywhere in Section 210, or for that matter in the Atomic Energy Act of which it is a part. In fact, there is an express provision of the Atomic Energy Act allowing states to regulate activities connected with atomic energy as long as that regulation is "for purposes other than protection against

---

<sup>8</sup> As this Court stated in rejecting the pre-emption of a state statute by the Social Security Act, "We cannot interpret federal statutes to negate their own stated purposes." *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 419-420 (1973). Similarly, this Court has stated in rejecting a claim of pre-emption of state minimum labor standards under ERISA and/or the NLRA,

It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

*Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). See also, *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 666 (1954). (The 1947 amendments to the NLRA increased, rather than decreased the legal responsibilities of labor organizations by creating union unfair labor practices. However, those very provisions creating additional responsibilities and sanctions against unions, were being asserted as the basis for pre-empting the kind of activities that the 1947 amendments were designed to reach.)

radiation hazards." 42 U.S.C. § 2021(k). Thus if the common-law action at issue in this case is to be found pre-empted by Section 210, that must occur through some process of inference.

Pre-emption by implication can arise in two general ways. First, if Congress evidences " . . . an intent to occupy a given field, . . . " then any state law falling within that field is pre-empted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), citing *Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190, 203-204 (1983). Second, a state law is pre-empted " . . . to the extent it actually conflicts with federal law, that is when it is impossible to comply with both state and federal law . . . ". *Silkwood, supra*, at 248; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

This Court has recognized that there is exclusive federal jurisdiction over the transfer, delivery, receipt, acquisition, possession and use of nuclear materials, such that the federal government maintains complete control of the safety and "nuclear" aspects of energy generation, leaving no role for the states in these areas. *Pacific Gas & Electric, supra*, at 212. However, even in the area of nuclear power generation, the states retain the ability to regulate such activity out of economic rather than nuclear safety concerns. *Id.*, at 216.<sup>9</sup> Yet, even with respect to

<sup>9</sup> The District Court correctly concluded that Section 210 was not intended to be a "regulator of nuclear safety", but was rather primarily an employee relations or employee protection statute. (Pet. App. 18a-19a) Thus the almost absolute pre-emption that applies to matters of nuclear safety does not come into play in this matter.

nuclear and radiation safety matters, the state may still play a role in the form of common law damage actions arising out of radiation damage. In this instance,

. . . pre-emption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

*Silkwood, supra*, at 256.<sup>10</sup>

#### IV. PRE-EMPTION IS NOT FAVORED, AND STATE AND FEDERAL LAWS SHOULD BE HARMONIZED TO AVOID PRE-EMPTION

The State's concern expressed through the recognition of an action for intentional infliction of emotional distress is to encourage civil dealings between its citizens and discourage actions that are disruptive of society. In such areas of traditional concern to the states, like the maintenance of peace or avoidance of fraud upon their citizens, a presumption exists against pre-emption.

When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'.

<sup>10</sup> This is the standard of pre-emption that the District Court ostensibly applied here. (Pet. App. 19a)



*ARC America*, 109 S.Ct. at 1664, quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also, *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored . . . "); *De Canas v. Bica*, 424 U.S. 351, 357 (1976) (Pre-emption can only be justified by " . . . a demonstration that complete ouster of state power – including state power to promulgate laws not in conflict with federal laws – was the clear and manifest purpose of Congress . . . ").

The basis for the presumption against pre-emption is grounded in our system of federalism. "Pre-emption analysis must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 19 (1987), citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). As explained in *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977),

This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts. (Citations omitted)

In light of the presumption against pre-emption, this Court has made it clear that it will not imply or expand limitations into federal statutes " . . . in order to enlarge their pre-emptive scope." *Metropolitan Life*, 471 U.S. at 741.

Rather than pre-empting state laws, the preference is to harmonize the federal and state acts if possible. "Where an enterprise touches different and not common interests between Nation and State, our task is that of harmonizing these interests without sacrificing either."

*Union Brokerage Co. v. Jensen*, 322 U.S. 202, 207-208 (1944). As stated more recently, "Our analysis is also to be tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). (Citations omitted) See also, *Askew v. American Waterways Operators*, 411 U.S. 325, 331 (1973).

Given the respect for our federalist system, this Court has ruled against pre-emption of state laws even in areas where the Constitution or the relevant federal statutes would seem to suggest pre-emption.<sup>11</sup> In light of this

---

<sup>11</sup> See, e.g., *De Canas, supra*. (California statute prohibiting employment of undocumented farmworkers not pre-empted even though it may have some impact on immigration, a matter exclusively assigned to the federal government by the Constitution.) *Pacific Gas & Electric, supra*. (State economic regulation of nuclear power plants, resulting in a moratorium on the construction of such plants, not pre-empted in spite of the fact that the federal government had totally occupied the area of atomic energy and nuclear power.) *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983). (State assertion of jurisdiction over wholesale rates charged by a rural electric co-operative not pre-empted either by the Federal Power Act or the Rural Electrification Act.) *Askew, supra*. (Florida statute imposing strict liability for oil spills not pre-empted by the Federal Water Quality Improvement Act or general federal maritime jurisdiction.) *ARC America, supra*. (State anti-trust action allowing recovery of damages by "indirect purchasers", not pre-empted even though the federal anti-trust act prohibits recovery by indirect purchasers.) *Dublino, supra*. (Additional state eligibility requirements for welfare benefits, in the form of additional work and training rules, not pre-empted in the face of a very complex and pervasive federal welfare scheme.) *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). (A Maryland statute prohibiting producers of gasoline from operating retail service stations and requiring that price reductions be extended by such producers to all stations, uniformly, not pre-empted by either the Sherman Antitrust Act or the Robinson-Patman Act.) *Fort Halifax, supra*. (State mandated severance payments in the event

(Continued on following page)

need to accommodate both state and federal concerns and actions where possible, the party arguing for pre-emption must make a very strong showing to overcome "... the presumption that state and local regulation ... can constitutionally co-exist with federal regulation." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985). See also, *ARC America*, 109 S.Ct. at 1665. Therefore, pre-emption of a state law will only be inferred where congressional intent to pre-empt is clear and compelling. However, the decisions below do not respect these teachings of this Court, as no clear and compelling intent to pre-empt common law actions can be shown through Congress' enactment of Section 210.

#### V. PRE-EMPTION IS GENERALLY NOT FOUND WHERE TO DO SO WOULD IMMUNIZE CONDUCT TRADITIONALLY RECOGNIZED AS ILLEGAL

The area of law in which the strongest preference for pre-emption exists is probably in the field of labor relations. In particular, the collective or concerted activities defined and protected by Section 7 of the National Labor Relations Act (NLRA), and the unfair labor practices defined in Section 8 of the Act are matters that are especially appropriate for uniform federal interpretation, and

(Continued from previous page)

of a plant closing were not pre-empted either by the Employee Retirement Income Security Act or the National Labor Relations Act.) *Metropolitan Life, supra*. (State statute requiring a specific minimum amount of mental health care coverage in all health insurance policies not pre-empted by either ERISA or the NLRA.)

constitute areas in which state intervention or supplementation is not permitted. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986). However, even in this area where pre-emption is most favored, state common law actions are still allowed to insure that the traditional concerns of the states with respect to protecting their citizens can continue to be addressed.

*United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954), involved a common law tort action in state court by a company whose business was damaged by the actions of a labor organization. The defendant employed threats of violence, coupled with the appearance of a large group of men, some of them armed, at the company's work sites. This forced the plaintiff company to cease its operations. In spite of the fact that the actions complained of constituted unfair labor practices under the NLRA, the Court did not pre-empt the common law damage action. The rationale was that such outrageous conduct had traditionally been treated as illegal by the states, and there was nothing in the language of the NLRA or its legislative history to indicate that Congress intended to immunize such illegal action from state remedies.

If petitioners were unorganized private persons, conducting themselves as petitioners did here, Virginia would have had undoubted jurisdiction of this action against them. The fact that petitioners are labor organizations, with no contractual relationship with respondent or its employees, provides no reasonable basis for a different conclusion.

*Id.* at 669.



Similarly, when a non-union employee was denied access to his job by violence and threats of violence during picketing and a strike at his job site, he was allowed to bring an action in state court for loss of earnings, mental anguish and punitive damages. *United Automobile Workers of America v. Russell*, 356 U.S. 634 (1958). Again, this Court concluded that the actions complained of were actionable as unfair labor practices under the NLRA, and that the National Labor Relations Board could have awarded the plaintiff compensatory damages in the form of back pay. *Id.* at 641. However, as in *Laburnum*, this Court found the case against pre-emption compelling. "There is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *Id.* at 644.

In *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), the plaintiff, an officer of a company involved in a labor dispute, brought a common law action for libel and defamation arising out of statements published during the labor dispute. Even though the events that formed the basis for the common law action might also form the basis for an unfair labor practice charge with the Board, this Court did not find it pre-empted. Concluding that a state had "... 'an overriding state interest' in protecting its residents from malicious libels ...", this Court held "... that a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' ..." that it would not be proper to pre-empt it. *Id.* at 61-62. *Linn* explains that the *Laburnum* and *Russell* decisions relied on the types of conduct involved in ruling against pre-emption. "In each of these cases the 'type of conduct' involved, i.e., 'intimidation and threats of

violence', affected such compelling state interests as to permit the exercise of state jurisdiction." *Id.* at 62.

*Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), like the present case, involved a common law claim for intentional infliction of emotional distress. However, the actions complained of arose out of the operation of a union hiring hall, and thus were arguably covered under Section 8 of the NLRA. Reviewing the prior cases, this Court again recognized the "overriding state interest" involved in a case such as *Farmer*, and concluded that "Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute." *Id.* at 298-299.

No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it.'

*Id.* at 302. This Court went on to explain that

The State ... has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in *Russell*, or damage to reputation, as in *Linn*.



*Id.* at 302. Thus a common law action for infliction of emotional distress, including a claim for punitive damages, was allowed to proceed in the face of what may be termed "NLRA pre-emption". *Id.* at 293.

*Belknap v. Hale*, 463 U.S. 491 (1983), again involved a situation that may have constituted an unfair labor practice, something over which the Board had exclusive jurisdiction. The plaintiffs had been hired as "permanent" replacement employees during a strike, and had been promised in writing on several occasions that they would remain as permanent employees when the strike was over. However, in violation of these promises, the replacement workers were discharged when the strike was settled.

The fired workers brought a common law action for breach of contract and misrepresentation. In arguing for pre-emption, the company contended that burdening it with costly suits by replacement workers would conflict with the federal policy favoring settlement of labor disputes. *Id.* at 499. Yet again, because of the nature of the actions involved, this Court found no pre-emption of the state actions even in the face of a seemingly compelling federal labor relations policy.

It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships.

*Id.* at 500. The conclusion in *Belknap* and the other cases discussed by Petitioner in this section was explained by this Court as follows:

... a State may regulate conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to pre-empt the application of state law.

*Id.* at 509.

Ms. English's claim currently before this Court is the type of common law claim allowed in *Laburnum*, *Russell*, *Linn*, *Farmer*, and *Belknap*. Like the claims in those cases, it alleges outrageous conduct and actions, and is a claim that is "deeply rooted in local law". The interest of North Carolina in providing a remedy to its citizens for conduct of this nature is separate and "discrete" from the concerns addressed in Section 210. See *Belknap*, 463 U.S. at 512. In addition, as will be shown *infra*, the argument for pre-emption under Section 210 is nowhere near as compelling as it is under the NLRA.<sup>12</sup>

<sup>12</sup> A rationale suggested to explain the result in *Laburnum* and the other cases, is that if pre-emption were found there would be absolutely no recovery of any sort available to the damaged parties. See, e.g., *Laburnum*, 347 U.S. at 663-664. The standard corollary to this explanation is that, where Congress has provided for at least some compensation for the damaged party, then pre-emption of the common law action is appropriate. (But see, *Russell*, *supra*, where backpay was available from the Board, yet the common law action was not pre-empted.) The District Court relied on just this rationale to explain and distinguish *Farmer*. (Pet. App. 28a) However, *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), decided after the District Court's decision in this case, lays that distinction to rest. The plaintiff in *Lingle* had a significant compensatory remedy available to her. In fact, at the time the case came before this Court, the plaintiff had already received full backpay and reinstatement. *Id.* at 1879.

## VI. THE LEGISLATIVE HISTORY OF SECTION 210 DOES NOT SUPPORT PRE-EMPTION

As set forth in Section IV, above, in order for pre-emption to be inferred, congressional intent must be clear and compelling. The legislative history of the statute is an area often examined in an attempt to find such compelling congressional intent. Given the presumption against pre-emption, the statements found in the legislative history must indicate an unambiguous and clear intent to pre-empt.

*Dublino, supra*, presents an example of inconclusive legislative history. There the party asserting pre-emption directed this Court to a few statements in the congressional debates and committee reports in support of her pre-emption argument. However, they were fragmentary and deemed unpersuasive. "At best, this statement is ambiguous as to a possible congressional intention to supersede all state work programs". 413 U.S. at 416. Such ambiguous legislative history cannot lead to a finding of pre-emption. "Far more would be required to show the clear manifestation of congressional intention which must exist before a federal statute is held to supersede the exercise of state action." *Id.* at 417. (Citation omitted) The lack of clear and compelling legislative history showing a congressional intent to pre-empt state laws, lead this Court in *Dublino* to hold that the state statute was not

---

(Continued from previous page)

Punitive damages were essentially the only matter at issue before this Court in *Lingle*, yet the fact of a compensatory remedy being available to Ms. Lingle was of no consequence in the pre-emption analysis. Similarly, even though Section 210 has some possibility of compensating Ms. English for her damages, that should not be a factor suggesting pre-emption.

pre-empted in spite of the very pervasive and comprehensive character of the federal statute at issue. *Id.* at 415. The lack of compelling legislative history showing an intent to pre-empt has, likewise, lead this Court to reject claims of pre-emption in other situations. *See, e.g., De Canas*, 424 U.S. at 358. (No specific indication in either the wording of the statute or the legislative history that Congress intended to preclude state regulation.); *California v. Zook*, 336 U.S. 725, 733 (1949).

Petitioner has conducted a thorough review of the legislative history of Section 210. That research has turned up nothing in the committee reports or the debates that even suggests an intention to pre-empt. The absence of any such history certainly weighs heavily against a finding that Ms. English's common law action is pre-empted.

The type of legislative history that would be required to support pre-emption is illustrated by *Pilot Life, supra*. There, both the House and Senate sponsors emphasized the breadth and importance of the pre-emption provisions being enacted. In the House, Representative Dent emphasized that federal authority would have sole power to regulate the field of employee benefit plans under ERISA. Likewise, in the Senate, Senator Williams stated that the exceptions to pre-emption were intended to be narrow, and that pre-emption was "... intended to apply in its broadest sense to all actions of State or local governments ...". 481 U.S. at 46. (Citations omitted)

At the time of the enactment of Section 210, at least 22 states had expressly recognized common law actions



for intentional infliction of emotional distress.<sup>13</sup> This fact also weighs heavily against a conclusion of pre-emption, as this Court "... generally presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 108 S.Ct. 1704, 1711-1712 (1988). The presumption of congressional knowledge about pertinent law includes common law as well as statutes. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980). Thus the existence of the allegedly conflicting and "pre-empted" laws in a number of states at the time that Congress enacted the federal legislation, has been cited as a significant factor by this Court particularly where the legislative history does not discuss or clearly show the intention to pre-empt those then-existing state laws. *Goodyear*, 108 S.Ct. at 1711. (At least 15 states provided remedies of the type under discussion, when Congress enacted the federal statute.); *Dublino*, 413 U.S. at

<sup>13</sup> *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal.2d 330, 240 P.2d 282 (1952); *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *Wiggins v. Moskins Credit Clothing Store, Inc.*, 137 F.Supp. 764 (E.D.S.C. 1956); *Cohen v. Lion Products Co.*, 177 F.Supp. 486 (D.Mass. 1959); *Knierim v. Izzo*, 22 Ill.2d 73, 174 N.E.2d 157 (1961); *Halio v. Lurie*, 15 App.Div.2d 62, 222 N.Y.S.2d 759 (1961); *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961); *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So.2d 154 (1963); *Korbin v. Berlin*, 177 So.2d 551 (Fla.App. 1965); *Beavers v. Johnson*, 112 Ga.App. 677, 145 S.E.2d 776 (1965); *Frishett v. State Farm Mutual Auto Ins. Co.*, 3 Mich.App. 688, 143 N.W.2d 612 (1966); *Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976); *Roshto v. Bajon*, 335 So.2d 486 (La.App. 1976); *Watson v. Franklin Finance Co.*, 540 S.W.2d 186 (Mo.App. 1976); *Bennett v. City National Bank and Trust Co.*, 549 P.2d 393 (Okla.App. 1976); *Jones v. Nissenbaum, Rudolph & Sneider*, 244 Pa.Super. 377, 368 A.2d 770 (1977); *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977); *Turman v. Central Billing Bureau, Inc.*, 279 Or. 443, 568 P.2d 1382 (1977); *Moorhead v. J. C. Penny Co., Inc.*, 555 S.W.2d 713 (Tenn. 1977); *Meiter v. Cavanaugh*, 40 Colo. App. 454, 580 P.2d 399 (1978); *Sheltra v. Smith*, 136 Vt. 472, 392 A.2d 431 (1978); *Harless v. First National Bank*, 162 W.Va. 116, 246 S.E.2d 270 (1978).

414. (At the time of passage of the federal work incentive program, 21 states already had welfare work requirements as a condition of eligibility.)<sup>14</sup>

## VII. THERE IS NO CONFLICT BETWEEN A COMMON LAW ACTION FOR INFLICTION OF EMOTIONAL DISTRESS AND SECTION 210, SUFFICIENT TO REQUIRE PRE-EMPTION

The District Court primarily relied on supposed conflicts between a claim for infliction of emotional distress and three specific aspects of Section 210: the exclusion in Section 210(g) of certain employees from the protections of the Act, the absence of a provision allowing punitive damages, and the short time limits in Section 210. (Pet. App. 19a)<sup>15</sup>

<sup>14</sup> It is a general rule of statutory construction that a statute is presumed to be consistent with the common law at the time of its enactment, and a statute creating a new method of enforcing a right which existed before its enactment is regarded as a cumulative remedy in the absence of clear intent to make it the exclusive remedy. 2A *Sutherland Statutory Construction* Section 50.05 (4th Ed. 1984). To the extent that Section 210 provides an avenue to seek compensation for mental and emotional distress, that avenue should be treated as cumulative, given the pre-existence of such common law claims in numerous states at the time that Section 210 was enacted.

<sup>15</sup> The actual basis for the District Court's finding of pre-emption is somewhat confused. After discussing at some length the ways in which the court found conflicts between the three specific aspects of Section 210 and a claim for infliction of emotional distress, the court then, almost gratuitously, concludes that Section 210 "is a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement." (Pet. App. 22a-23a) (Note: Petitioner's "confusion" on the court's basis for its decision is shared by the Solicitor

(Continued on following page.)



When pre-emption is to be inferred from supposed conflicts, those conflicts must be substantial and actual, and not just speculative or hypothetical. "In other words, such intent [to pre-empt] is not to be implied unless the act of Congress fairly interpreted is in *actual conflict* with the law of the State." *Savage v. Jones*, 225 U.S. 501, 533 (1912) (Emphasis added). See also, *Florida Lime & Avocado Growers*, 373 U.S. at 142-143. (Conflict occurs when compliance with both the federal and state laws is a physical impossibility.); *Jones*, 430 U.S. at 544. [Pre-emption requires the "clear demonstration of conflict . . . before the mere existence of a federal law may be said to pre-empt state law operating in the same field." (Rehnquist, J., dissenting)] "The 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' *Huron Cement Co. v.*

---

(Continued from previous page)

General. See, Brief for the United States as Amicus Curiae in support of the Petition for Certiorari at p. 8, f.n. 6.) If the court's holding is truly grounded on a finding of "pervasiveness", it is not well-taken. This Court has specifically rejected an assertion that pre-emption should be inferred from the nature of a federal welfare statute whose character was far more comprehensive than that found in Section 210. "Given the complexity of the matter addressed by Congress in the federal work incentive program, a detailed statutory scheme was both likely and appropriate, *completely apart from any questions of pre-emptive intent*." *Dublino*, 413 U.S. at 415 (Emphasis added). Given the obvious intent of Congress in Section 210 to fashion a scheme that would provide relatively speedy administrative relief to an employee, it is impossible to imagine the enactment of a statute that would not have some of the attributes of a "pervasive" or "comprehensive scheme". In addition, even if Section 210 did constitute a "pervasive scheme", this Court has clearly allowed states to supplement the federal remedies, given a compelling state interest, as long as such "supplementation" does not conflict with the federal statute. *Farmer, supra*; *Pacific Gas & Electric, supra*. See the discussion above and the discussion in Section VIII, *infra*.

*Detroit*, 362 U.S. 440, 446." *Exxon*, 437 U.S. at 130. The existence of only speculative or hypothetical conflicts is not sufficient to warrant an inference of pre-emption. *Id.* at 131.

*ARC America, supra*, is an example of the lower courts' failure to follow the directions of this Court concerning the need for actual, not speculative conflicts in order to support pre-emption. There the District Court concluded that the state statutes " . . . are clear attempts to frustrate the purposes and objectives of Congress . . . ". 109 S.Ct. at 1664. In affirming that decision, the Court of Appeals set forth three "purposes or objectives" of the federal law at issue, and concluded that the state statute would "impermissibly interfere" with those three federal goals. *Id.* at 1664. This Court found the "conflicts" and "frustrations" relied upon by the lower courts to be speculative, and concluded that the state statute was not pre-empted.

Indeed, taken to its extreme, the Court of Appeals' logic would lead to the pre-emption of any state-law claims against antitrust defendants, even if wholly unrelated, because the presence of other litigation could threaten the defendants with bankruptcy and reduce their willingness to settle.

*Id.* at 1667. See also, *Hillsborough*, 471 U.S. at 712 and 720. (The Court of Appeals found "a serious danger of conflict" between the federal and local regulations, while this Court found the alleged conflicts "too speculative to support pre-emption.")

As in the cases cited above, the "conflicts" found here by the District Court between a claim for infliction

of emotional distress and Section 210 are too speculative and hypothetical to warrant an inference of pre-emption.

**A. Section 210(g) Does Not Conflict With A Claim For Intentional Infliction of Emotional Distress**

Subsection (g) of Section 210 excludes an employee from the protections provided under Subsection (a) if an employee "acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act . . .". The District Court discusses this provision at some length, and even sets forth three different hypotheticals to try to establish a conflict with common law actions. (Pet. App. 19a-21a)<sup>16</sup>

In its discussion of a conflict with Subsection (g), the District Court appeared to focus primarily on the fact that an employee might be reinstated by a state court, where Congress had expressly forbidden such reinstatement. (Pet. App. 21a) While a concern about reinstatement might raise the theoretical possibility of a conflict in a common law action alleging wrongful discharge, it has absolutely no application in an action alleging intentional infliction of emotional distress like the present action.

<sup>16</sup> In its discussion, the court ignores the legislative history indicating that this provision is limited only to deliberate violations done to actually invoke "whistleblower" protection, rather than the absolute and all-encompassing exclusion hypothesized by the court. See, S. Rep. No. 848, 95th Cong., 2d Sess. 30, *Reprinted in* 1978 U.S. Code Cong. & Ad. News 7303, 7304. This legislative history was cited to the court in Petitioner's briefs, yet it is not addressed. Given that Section 210 is clearly remedial legislation which should be entitled to a broad and liberal construction under standard principles of statutory interpretation, and conversely that all limitations on the protections under such remedial legislation should be interpreted in a narrow and limited fashion, the legislative history indicating a narrow intent and purpose for Section 210(g) is particularly significant.

Petitioner does not seek reinstatement under that theory of recovery, and is not aware of any basis for claiming reinstatement under a theory of intentional infliction of emotional distress.<sup>17</sup>

The fundamental error of the District Court is that it did not focus on the interests being protected by North Carolina in a common law action for intentional infliction of emotional distress. As set forth in Section I of this Argument, a claim for infliction of emotional distress is not directed in any way at employers in the nuclear industry, or, indeed, specifically at the employer-employee relationship at all. Rather, it is a claim available in a variety of situations to attempt to assure that residents of the state, be they corporate or individual, will avoid subjecting other residents to outrageous and uncivilized conduct. As discussed in Section V, above, North Carolina's interest in a common law claim for infliction of emotional distress is fundamentally identical to the state interests held to be immune from the strong pre-emptive features of the NLRA in *Laburnum*, *Russell*, *Linn*, *Farmer*, and *Belknap*.

Once the nature of the state's interest in a claim for infliction of emotional distress is understood, it is clear that Section 210(g) has absolutely no application to such a claim and thus there could never be a conflict. The purpose of Section 210 is to afford employees additional

<sup>17</sup> Petitioner strongly denies that she ever engaged in any activity that would fall within the coverage of Section 210(g). In fact, the Department of Labor Administrative Judge, after a lengthy hearing, specifically addressed Respondent's contention that Ms. English had violated a provision of the Atomic Energy Act, and specifically rejected it based on all of the evidence presented. See, "Statement of the Case", *supra*, at 6-7.



protections such that they will come forward with information about improper practices. The statute was never intended to authorize illegal or outrageous conduct by an employer. Even if an employee engaged in an activity that constituted a very flagrant violation of the Atomic Energy Act, at most the employer would only be justified in discharging the employee. No matter how egregious the violation done by the employee, the fundamental concepts that apply to a civilized society make clear that such action would still not justify an employer's illegal and outrageous action to subject and induce serious emotional distress in the employee. Congress certainly did not intend to authorize such illegal activity on the part of employers by enacting Section 210, and North Carolina and many other states have made it clear that they will not tolerate such outrageous and illegal conduct.<sup>18</sup>

#### B. The Absence of Exemplary Damages In Section 210 Does Not Establish A Conflict.

The District Court also relied heavily on the absence of a provision allowing punitive damages in Section 210 as creating a conflict sufficient to infer pre-emption of the infliction of emotional distress claim. Again, given the

<sup>18</sup> Section 210(g) also does not create an actual conflict with a common law action asserting wrongful discharge. As set forth above, state and federal laws should be harmonized to avoid possible conflicts and pre-emption. If there were a legitimate claim of intentional violations of the Act by the plaintiff in a wrongful discharge case, the better approach would be to allow the employer to assert a "section 210(g) defense" in state court such that reinstatement would not be a remedy available to the plaintiff. See, *Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144, 1150 (1st Cir. 1989).

nature of the interests to be protected in an emotional distress action, Section 210 and the compensation available under it just has no application. In addition, this Court has made clear that "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *California v. Zook*, 336 U.S. 725, 736 (1949) . . .". *ARC America*, 109 S.Ct. at 1667.

In the nuclear context, this Court has specifically rejected a claim that the requirement to pay punitive damages in a common law action conflicts with the purposes of the Atomic Energy Act, such that a common law claim for punitive damages is pre-empted. *Silkwood*, *supra*.

Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

464 U.S. at 257. While recognizing that a primary purpose of the Atomic Energy Act is the promotion of nuclear power, this Court specifically rejected a contention that punitive damages should be pre-empted because they might frustrate Congress' desire to encourage widespread participation in the development of nuclear power. *Id.* at 257.

Equally compelling on this point is the fact that punitive damages in state actions were *not* pre-empted in *Laburnum*, *Russell*, *Belknap*, and *Lingle*, where the applicable federal provisions did not allow such damages. Because the fundamental state interests at issue in this case



are identical to those in *Laburnum* and its progeny, the absence of punitive damages in Section 210 is not compelling evidence of a need to pre-empt the state common law action.<sup>19</sup>

### C. The Time Frames In Section 210 Do Not Support An Inference of Pre-emption

The District Court was "impressed with the speed with which charges brought pursuant to Section 210 must be resolved." (Pet. App. 22a) In particular, the court hypothesized what it apparently perceived as a compelling conflict in which, because of the longer statute of limitations for common law torts, a "catastrophe" could occur because the employee's information is not made available to the appropriate officials. (Pet. App. 23a)

The simple answer is that literally for years Ms. English had been reporting her concerns both to G. E.'s management and to the NRC. The appropriate officials were fully aware of the information that she possessed. Thus the conflict hypothesized by the District Court is most definitely of a speculative nature, and cannot support an inference of pre-emption.<sup>20</sup>

<sup>19</sup> This court has also made clear that some level of conflict or "indirect impact is acceptable". *De Canas*, 424 U.S. at 355; *Exxon*, 437 U.S. at 133. ("There is a conflict between the statute and the central policy of the Sherman Act. . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute.") Such indirect or minor conflicts are especially tolerated where, as in this case, the conduct sought to be regulated by the state claim is "of only peripheral concern" to the federal law and is "deeply rooted in local law". *Belknap*, 463 U.S. at 509-510.

<sup>20</sup> In many other situations where there has been a hypothetical possibility of conflict, this Court has not found pre-emption, but has  
(Continued on following page)

The reality is that most cases will arise in a context similar to Ms. English's. That is, the employee will have already conveyed her or his significant information to appropriate authorities, prior to being subjected to the types of discriminatory actions prohibited by Section 210. This is because the protection of Section 210 only applies in the following situations: 1) If an employee has already filed an action under Section 210 or some other provision of the Atomic Energy Act (the District Court's hypothetical conflict certainly could not apply here as DOL and/or NRC would certainly be aware of these actions); 2) has testified or is about to testify in such a proceeding (again the federal officials would most likely know of such testimony); or 3) has assisted or participated in some proceeding or other action to carry out the purposes of the Act. Section 210(a), 42 U.S.C. § 5851(a). In fact, the retaliation and discrimination directed at the employee by the employer might actually occur months or perhaps even years after the employee had turned over his or her information to the appropriate officials. In such a hypothetical, the time frames of Section 210 have nothing to do with preventing the District Court's "catastrophe", but are only of benefit to the employee in hopefully resolving the matter quickly.

While protecting nuclear whistleblowers is not a specific concern of the State in a claim for infliction of

(Continued from previous page)

indicated that any such "conflicts" should only be addressed after a full development of the facts, such that the actual conflicts can be determined. *Arkansas Electric*, 461 U.S. at 389; *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 594 (1987); *De Canas*, 424 U.S. at 365.

emotional distress, the availability of such a remedy incidentally does provide additional protections to such employees. As discussed in more detail in Section II of this Argument, above, additional protections for employees who engage in "whistleblowing" is certainly the prime purpose of Section 210. Where the purposes of the state and federal laws are similar, this Court is even more reluctant to pre-empt the state law, and thus more tolerant of potential incidental conflicts. *Exxon*, 437 U.S. at 132-133. Thus if this Court concludes that some speculative or incidental conflict does exist between a Section 210 action and a common law action for infliction of emotional distress, arising out of the time frames of Section 210, such "conflicts" are not sufficiently compelling to require pre-emption.

#### VIII. REVERSAL OF THE LOWER COURT DECISIONS IS CONSISTENT WITH, AND COMPELLED BY, THE DECISIONS IN *PACIFIC GAS & ELECTRIC* AND *SILKWOOD*

In *Pacific Gas & Electric Co. v. Energy Resources Commission*, 461 U.S. 190 (1983), this Court unanimously rejected a claim of pre-emption with regard to a California statute requiring that the state must determine that an approved technology for the permanent disposal of high level nuclear waste has been developed, before additional nuclear power plants could be built. That statute was obviously passed to specifically deal with issues affecting nuclear power. In spite of this Court's unequivocal conclusion that "... the Federal Government has occupied the entire field of nuclear safety concerns ..." (461 U.S. at 212), the state law was allowed to remain in effect on

the basis that it was enacted for an "economic purpose" and thus "... lies outside the occupied field of nuclear safety regulation." 461 U.S. at 216. This decision compels reversal of the lower courts' decisions in the present case.

The situation presented by Ms. English's common law claim for infliction of emotional distress is much simpler than the situation confronted in *Pacific Gas & Electric*. Rather than involving a state law directed specifically at issues arising out of nuclear power, or even issues arising out of the employer-employee relationship addressed by Section 210, the common law action for infliction of emotional distress applies to all residents of North Carolina in a great variety of situations. Such a state law of general application is even less likely to be subject to pre-emption, than the specific nuclear power law at issue in *Pacific Gas & Electric*. See, *Union Brokerage*, 322 U.S. at 206-208 (1944). While the North Carolina action at issue in the present case is thus less susceptible to pre-emption than the California statute at issue in *Pacific Gas & Electric*, the North Carolina cause of action arises out of the same "... historic police powers of the States ..." that lead this Court to find no pre-emption. *Pacific Gas & Electric*, 461 U.S. at 206.

As discussed in Section I of this Argument, above, the purpose of an action for infliction of emotional distress is to prevent outrageous conduct by one resident of the state directed against another, in order to maintain civilized societal interactions. Like the economic purpose asserted by California, the purpose of a common law infliction of emotional distress action "... lies outside the occupied field of nuclear safety regulation." 461 U.S.



at 216.<sup>21</sup> Therefore the argument for pre-emption of the North Carolina common law action is even less compelling than the argument for pre-emption put forward in *Pacific Gas & Electric*.

The situation presented by Ms. English's infliction of emotional distress claim is also an easier case to address than the one confronted by this Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). In that case the tort itself involved exposure to radiation which was regulated by the NRC. Quite obviously this appears to fall within the area of absolute pre-emption set forth in *Pacific Gas & Electric*. Indeed, the award of punitive damages in *Silkwood* was based on "substantial evidence of poor training, poor security, and indifference to hazards" at the plant. *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 922 (10th Cir. 1981), *rev. on other grnds.*, 464 U.S. 238. The award of punitive damages thus represented a direct imposition of a state liability standard on nuclear safety practices, which, as a general matter, are exclusively within the domain of the Federal Government and the NRC. In addition, the case before this Court involved only the punitive damages. As such damages are, in theory, purely regulatory, the award of punitive damages on the basis described above could be said to constitute "nuclear safety regulation", which is generally the exclusive province of the NRC. *See, Silkwood*, 464 U.S. at 260-62 (Blackmun, J., dissenting).

<sup>21</sup> Thus even if, in some manner, this Court concludes that Section 210 is a statute regulating nuclear safety, North Carolina's common law action for infliction of emotional distress would still *not* be pre-empted, according to the rationale of *Pacific Gas & Electric*.

In spite of the entanglement with radiation and nuclear safety concerns in *Silkwood*, this Court held that the state common law tort action, including punitive damages, was not pre-empted. Where, as in the present case, the common law tort has nothing whatsoever to do with nuclear safety or regulation, but rather arises out of the mental and emotional harassment directed towards Ms. English over the last several months of her employment, the common law tort action most certainly should not be pre-empted. To contend that Congress meant to preserve the tort action in *Silkwood*, but at the same time to pre-empt actions for intentional infliction of emotional distress like the present one, is to attribute to Congress a very strange and irrational intent. There is certainly no evidence of such a strange and irrational intent on Congress' part, thus in light of *Silkwood* Ms. English's claim should not be pre-empted.

---

## CONCLUSION

For the foregoing reasons, this Court should rule that state common law actions which do not clearly, actually, and significantly conflict with Section 210 of the Energy Reorganization Act, are not pre-empted by that federal statute. Therefore, the judgment of the Court of Appeals should be reversed with instructions that the case be remanded to the District Court to allow it to proceed to discovery and trial on Plaintiff-Petitioner's claim for intentional infliction of emotional distress.



This the 8th day of March, 1990.

Respectfully submitted,

M. TRAVIS PAYNE  
EDELSTEIN, PAYNE & NELSON  
P.O. Box 12607  
Raleigh, NC 27605  
(919) 828-1456

ARTHUR M. SCHILLER  
Attorney at Law  
1920 N Street, N.W.  
Suite 430  
Washington, D.C. 20036  
(202) 857-5658

*Counsel for Petitioner*

## APPENDIX

SECTION 210 OF THE ENERGY REORGANIZATION  
ACT

42 U.S.C. § 5851. Employee protection.

(a) Discrimination against employee

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated



## App. 2

against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complaint (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position

## App. 3

together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

### (c) Review

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

### (d) Jurisdiction

Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district

#### App. 4

in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

##### (e) Commencement of action

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

##### (f) Enforcement

Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28.

##### (g) Deliberate violations

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended.

---

**THE NEW YORK PUBLIC LIBRARY**

**BEST AVAILABLE COPY**



## QUESTION PRESENTED

Whether Section 210 of the Energy Reorganization Act, which provides a comprehensive federal administrative remedy (including compensatory damages) for employees at nuclear facilities as an integral part of the government's program to ensure safety in the operations of those facilities, preempts state law claims for intentional infliction of emotional distress arising out of allegedly retaliatory changes in the terms and conditions of employment for raising safety concerns at a nuclear facility.

## RULE 29.1 STATEMENT

General Electric Company has no parent company. The subsidiaries of General Electric Company that have outstanding equity or debt securities that are publicly held are listed in the brief in opposition to the petition for certiorari and in the supplemental brief.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
RULE 29.1 STATEMENT .....	ii
TABLE OF AUTHORITIES .....	v
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	11
I. A STATE LAW CLAIM FOR INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS ARISING OUT OF RETALIATORY EMPLOY- MENT ACTIONS AT A NUCLEAR FACIL- ITY INVADES THE FIELD OF NUCLEAR SAFETY AND OPERATIONS AND IS THEREFORE PREEMPTED .....	12
A. Congress Has Preempted The Entire Field Of Nuclear Safety And Operations .....	12
B. Section 210 Lies Squarely Within The Field Of Nuclear Safety Concerns .....	16
C. Section 210 Preempts State Law Claims For Intentional Inflection Of Emotional Distress That Arise Out Of Retaliatory Employment Action For Whistleblowing At A Nuclear Facility .....	27
D. State Law That Infringes On A Field Re- served Exclusively For Federal Control Is Preempted Regardless Of Its Purpose .....	32
II. PETITIONER'S STATE LAW CLAIM IS PREEMPTED BECAUSE IT STANDS AS AN OBSTACLE TO THE FULL ACHIEVEMENT OF CONGRESS'S OBJECTIVES IN REGU- LATING THE SAFETY AND OPERATIONS OF NUCLEAR FACILITIES .....	36

## TABLE OF CONTENTS—Continued

	Page
A. Congress's Objective In Enacting Section 210 Was To Create A Balanced Scheme That Would Further The Goal Of Ensuring The Safe Operation Of Nuclear Facilities .....	37
B. Failure To Preempt State Law Claims For Injuries Arising Out Of Conduct Regulated By Section 210 Would Preclude This Statute From Fully Achieving Its Purposes .....	38
C. Allowing Employees To Seek Punitive Damages Fundamentally Conflicts With Congress's Intent .....	42
III. BY ANALOGY TO LABOR PREEMPTION DOCTRINES, SECTION 210 PREEMPTS A CLAIM FOR EMOTIONAL DISTRESS ARISING OUT OF ALLEGED EMPLOYMENT DISCRIMINATION IN RETALIATION FOR REPORTING NUCLEAR SAFETY COMPLAINTS .....	45
A. Under Labor Preemption Principles, Petitioner's Claim Is Preempted Because It Arises Out Of Conduct Addressed By Section 210 .....	46
B. Labor Preemption Principles Require Preemption Where, As Here, There Is An Imminent Possibility That State Law Remedies Will Conflict With Federal Law .....	48
CONCLUSION .....	50

## TABLE OF AUTHORITIES

CASES	Page
<i>Atchison, T. &amp; S. F. Ry. v. Buell</i> , 480 U.S. 557 (1987) .....	25, 41
<i>Automobile Workers v. Russell</i> , 356 U.S. 634 (1958) .....	48
<i>Belknap, Inc. v. Hale</i> , 463 U.S. 491 (1983) .....	46
<i>Bonito Boats, Inc. v. Thunder* Craft Boats, Inc.</i> , 109 S.Ct. 971 (1989) .....	37
<i>Bowen v. Massachusetts</i> , 108 S.Ct. 2722 (1988) .....	28
<i>Boyle v. United Technologies Corp.</i> , 108 S.Ct. 2510 (1988) .....	45
<i>Brockett v. Spokane Arcades, Inc.</i> , 472 U.S. 491 (1985) .....	28
<i>Brown &amp; Root, Inc. v. Donovan</i> , 747 F.2d 1029 (5th Cir. 1984) .....	39
<i>California v. ARC America Corp.</i> , 109 S.Ct. 1661 (1989) .....	26
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984) .....	34
<i>Chicago &amp; N.W. Transp. Co. v. Kalo Brick &amp; Tile Co.</i> , 450 U.S. 311 (1981) .....	29
<i>City of Burbank v. Lockheed Air Terminal</i> , 411 U.S. 624 (1973) .....	29
<i>Consolidated Edison Co. of N.Y. v. Donovan</i> , 673 F.2d 61 (2d Cir. 1982) .....	39
<i>County of Rockland v. N.R.C.</i> , 709 F.2d 766 (2d Cir.), <i>cert. denied</i> , 464 U.S. 993 (1983) .....	15
<i>DeFord v. Secretary of Labor</i> , 700 F.2d 281 (6th Cir. 1983) .....	21, 32
<i>Dockery v. Lampart Table Co.</i> , 36 N.C. App. 293, 244 S.E.2d 272 (1978) .....	25
<i>English v. Whitfield</i> , 858 F.2d 957 (4th Cir. 1988) .....	6, 29
<i>Erlenbaugh v. U.S.</i> , 409 U.S. 239 (1972) .....	24
<i>Exxon Corp. v. Eagerton</i> , 462 U.S. 176 (1983) .....	12
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977) .....	passim
<i>Fidelity Fed. Sav. &amp; Loan Ass'n v. De La Cuesta</i> , 458 U.S. 141 (1982) .....	13



## TABLE OF AUTHORITIES—Continued

	Page
<i>Florida Lime &amp; Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963) .....	9, 34
<i>Fortune v. National Cash Register Co.</i> , 373 Mass. 96, 364 N.E.2d 1251 (1977) .....	25
<i>Frampton v. Central Ind. Gas Co.</i> , 260 Ind. 249, 297 N.E.2d 425 (1973) .....	25
<i>Garner v. Teamsters Local Union No. 776</i> , 346 U.S. 485 (1953) .....	48
<i>Georgia Power Co. v. Busbin</i> , 242 Ga. 612, 250 S.E.2d 442 (1978) .....	25
<i>Golden State Transit Corp. v. City of Los Angeles</i> , 475 U.S. 608 (1986) .....	34, 37
<i>Guy v. Travenol Laboratories, Inc.</i> , 812 F.2d 911 (4th Cir. 1987) .....	24
<i>Harless v. First National Bank</i> , 162 W. Va. 116, 246 S.E.2d 270 (1978) .....	25
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941) .....	9, 11, 12, 36
<i>Hinrichs v. Tranquilaire Hospital</i> , 352 So.2d 1130 (Ala. 1977) .....	25
<i>Hisquierdo v. Hisquierdo</i> , 439 U.S. 572 (1979) .....	37
<i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988) .....	41
<i>International Brotherhood of Electrical Workers v. Foust</i> , 442 U.S. 42 (1979) .....	43
<i>International Paper Co. v. Ouellette</i> , 479 U.S. 481	
<i>Iowa Elec. Light &amp; Power Co. v. Local Union 204</i> , (1987) .....	23, 32, 37
834 F.2d 1424 (8th Cir. 1987) .....	43
<i>Jackson v. Minidoka Irrigation Dist.</i> , 98 Idaho 330, 563 P.2d 54 (1977) .....	25
<i>Kansas Gas &amp; Elec. Co. v. Brock</i> , 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986) .....	39
<i>Lingle v. Norge Div. of Magic Chef, Inc.</i> , 108 S.Ct. 1877 (1988) .....	48
<i>Mackowiak v. University Nuclear Sys., Inc.</i> , 735 F.2d 1159 (9th Cir. 1984) .....	39
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981) .....	36
<i>Massachusetts Mut. Life Ins. Co. v. Russell</i> , 473 U.S. 134 (1985) .....	24, 36, 42

## TABLE OF AUTHORITIES—Continued

	Page
<i>Monge v. Beebe Rubber Co.</i> , 114 N.H. 130, 316 A.2d 549 (1974) .....	25
<i>Motor Coach Employees v. Lockridge</i> , 403 U.S. 274 (1971) .....	46, 49
<i>Nees v. Hocks</i> , 272 Or. 210, 536 P.2d 512 (1975) ..	25
<i>Northern States Power Co. v. State of Minnesota</i> , 447 F.2d 1143 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972) .....	15
<i>Northwest Airlines, Inc. v. Transport Workers, Inc.</i> , 451 U.S. 77 (1981) .....	24, 36
<i>O'Sullivan v. Mallon</i> , 160 N.J. Super. 416, 390 A.2d 149 (1978) .....	25
<i>Pacific Gas &amp; Electric v. State Energy Resources Conservation and Dev. Comm'n</i> , 461 U.S. 190 (1983) .....	passim
<i>Perez v. Campbell</i> , 402 U.S. 637 (1971) .....	34
<i>Petermann v. International Brotherhood of Team- sters</i> , 174 Cal. App. 2d 184, 344 P.2d 25 (1959) ..	25
<i>Pilot Life Ins. Co. v. DeDeaux</i> , 481 U.S. 41 (1987) .....	24, 37
<i>Porter County Chapter v. N.R.C.</i> , 606 F.2d 1363 (D.C. Cir. 1979) .....	15
<i>Power Reactor Dev. Co. v. International Union</i> , 367 U.S. 396 (1961) .....	15
<i>Raley v. Darling Shop of Greenville, Inc.</i> , 216 S.C. 536, 59 S.E.2d 148 (1950) .....	25
<i>Reuther v. Fowler &amp; Williams, Inc.</i> , 255 Pa. Super. 28, 386 A.2d 119 (1978) .....	25
<i>Reynolds v. United States</i> , 286 F.2d 433 (9th Cir. 1960) .....	15
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) .....	8, 12, 33, 35
<i>Rockford League of Women Voters v. N.R.C.</i> , 679 F.2d 1218 (7th Cir. 1982) .....	15
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236 (1959) .....	29, 45, 48, 49
<i>Scrogan v. Krafteo Corp.</i> , 551 S.W.2d 811 (Ky. App. 1977) .....	25

## TABLE OF AUTHORITIES—Continued

	Page
<i>Sears, Roebuck &amp; Co. v. San Diego County Dist. Council of Carpenters</i> , 436 U.S. 180 (1978).....	45
<i>Segal v. Arrow Indus. Corp.</i> , 364 So.2d 89 (Fla. App. 1978) .....	25
<i>Siegel v. Atomic Energy Comm'n</i> , 400 F.2d 778 (D.C. Cir. 1968) .....	15
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) .....	<i>passim</i>
<i>State of New Hampshire v. Atomic Energy Comm'n</i> , 406 F.2d 170 (1st Cir.), <i>cert. denied</i> , 395 U.S. 962 (1969) .....	15
<i>Stephens v. Justiss-Mears Oil Co.</i> , 300 So.2d 510 (La. App. 1974) .....	25
<i>Sventko v. Kroger Co.</i> , 69 Mich. App. 644, 245 N.W.2d 151 (1976) .....	25
<i>Township of Hillsborough v. Cromwell</i> , 326 U.S. 620 (1946) .....	28
<i>Train v. Colorado Pub. Interest Research Group, Inc.</i> , 426 U.S. 1 (1976) .....	37
<i>Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd.</i> , 474 U.S. 409 (1986) .....	26
<i>United Constr. Workers v. Laburnum Constr. Corp.</i> , 347 U.S. 656 (1954) .....	48
<i>University of Tennessee v. Elliot</i> , 478 U.S. 788 (1986) .....	44
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1978) .....	15
<i>Wisconsin Dept. of Indus. v. Gould, Inc.</i> , 475 U.S. 282 (1986) .....	48, 49
<i>Yanta v. Montgomery Ward &amp; Co., Inc.</i> , 66 Wis. 2d 53, 224 N.W.2d 389 (1974) .....	25
CONSTITUTIONAL PROVISIONS, STATUTES & REGULATIONS	
U.S. Const. art. VI, § 2 .....	<i>passim</i>
Atomic Energy Act of 1954, ch. 1073, 68 Stat. 921 (codified as amended at 42 U.S.C. §§ 2011 <i>et seq.</i> ) .....	<i>passim</i>
42 U.S.C. § 2012(e) .....	8, 13
42 U.S.C. § 2014(aa) .....	1

## TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 2019 .....	13
42 U.S.C. § 2021 .....	14
42 U.S.C. § 2021(b) .....	1, 14
42 U.S.C. § 2021(j) .....	14
42 U.S.C. § 2021(k) .....	31, 32
42 U.S.C. § 2073 .....	13, 32
42 U.S.C. § 2073(a) .....	1
42 U.S.C. § 2073(b) .....	8, 18
42 U.S.C. § 2077 .....	1, 13
42 U.S.C. § 2201(b) .....	2, 8, 13, 18
42 U.S.C. § 2137 .....	18
42 U.S.C. § 2133(b) .....	8
42 U.S.C. § 2137 .....	18
Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified as amended at 42 U.S.C. §§ 5801 <i>et seq.</i> ) .....	<i>passim</i>
42 U.S.C. § 5841(f) .....	15, 18
42 U.S.C. § 5843(b) (2) (A) .....	16
42 U.S.C. § 5843(b) (2) (B) .....	16
42 U.S.C. § 5844(b) .....	16
42 U.S.C. § 5846 .....	8, 16, 18
42 U.S.C. § 5851 .....	<i>passim</i>
42 U.S.C. § 5851(a) .....	16, 17
42 U.S.C. § 5851(b) (1) .....	17
42 U.S.C. § 5851(b) (2) (B) .....	17, 23, 43
42 U.S.C. § 5851(d) .....	18, 23, 43
42 U.S.C. § 5851(g) .....	<i>passim</i>
42 U.S.C. § 5877(c) .....	16
Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141 <i>et seq.</i> ) .....	48
National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151 <i>et seq.</i> ) .....	
29 U.S.C. § 158(a) (4) .....	46
29 U.S.C. § 160 .....	46
29 U.S.C. § 160(c) .....	37

## TABLE OF AUTHORITIES—Continued

	Page
Price Anderson Act of 1957, Pub. L. No. 85-256, 71 Stat. 576 (codified at 42 U.S.C. §§ 2012, 2014) .....	31
Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1682 (1974) (codified as amended at 42 U.S.C. §§ 300f <i>et seq.</i> ) .....	
42 U.S.C. § 300j-9 (i) (2) (B) (ii) .....	23
Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601 <i>et seq.</i> ) .....	
15 U.S.C. § 2622 (b) .....	23
10 C.F.R. Parts 0-171:	
Part 2:	
§ 2.206 .....	5
App. C .....	18, 20
Part 8:	
§ 8.4 (i) .....	15
§ 8.4 (d) .....	15
Part 19:	
§ 19.12 .....	8, 16, 19
§ 19.14 .....	19
§ 19.15 .....	19
§ 19.16 .....	19
§ 19.20 .....	8
Part 20 .....	2
Part 21:	
§ 21.1 .....	18
§ 21.21 .....	8, 18
§ 21.21 (a) (2) .....	19
§ 21.61 .....	18
Part 50:	
App. B .....	3
Part 70:	
Part 70 .....	2
§ 70.3 .....	1

## TABLE OF AUTHORITIES—Continued

	Page
§ 70.4 (m) .....	1
§ 70.7 (c) .....	8, 20, 39
§ 70.7 (e) .....	20
§ 70.21 (a) (1) .....	1
§ 70.22 (a) (7) .....	2
§ 70.22 (a) (8) .....	2
§ 70.22 (f) .....	2, 3
§ 70.24 .....	2
§ 70.31 (d) .....	2
§ 70.51 .....	2, 18
§ 70.52 .....	18
§ 70.53 .....	18
§ 70.54 .....	18
§ 70.55 .....	18
§ 70.56 .....	18
§ 70.57 .....	18
§ 70.58 .....	18
§ 70.59 .....	18
Part 150:	
§ 150.11 .....	2, 14
29 C.F.R. § 24.3 .....	5

LEGISLATIVE AND ADMINISTRATIVE  
MATERIALS

S. Rep. No. 870, 86th Cong., 1st Sess., <i>reprinted</i> <i>in</i> 1959 U.S. Code Cong. & Admin. News 2872..	15
S. Rep. No. 848, 95th Cong., 2nd Sess., <i>reprinted</i> <i>in</i> 1978 U.S. Code Cong. & Admin. News 7303.... <i>passim</i>	
<i>Federal-State Relationships in the Atomic Energy</i> <i>Field, Hearings Before the Joint Comm. on</i> <i>Atomic Energy, 86th Cong., 1st Sess. (1959)....</i>	14
<i>Whistleblower Protection Act: Hearing on H.R.</i> <i>3368 Before the Subcomm. on Labor-</i> <i>Management Relations of the House Comm.</i> <i>on Education and Labor, 101st Cong., 1st Sess.</i> <i>(1989) .....</i>	39
120 Cong. Rec. 36,393 (1974) .....	37
124 Cong. Rec. 29,769 (1978) .....	21



## TABLE OF AUTHORITIES—Continued

	Page
124 Cong. Rec. 33,255 (1978) .....	21
47 Fed. Reg. 30,452 (1982) .....	38
47 Fed. Reg. 30,453 (1982) .....	8, 19
47 Fed. Reg. 54,585 (1982) .....	17, 20, 22
<i>Ashcraft v. University of Cincinnati</i> , 83-ERA-7 (Secretary's Decision, Nov. 1, 1984) .....	44
<i>Darety v. Zack Co.</i> , 82-ERA-2 (Secretary's Deci- sion, Apr. 25, 1983) .....	24
<i>Francis v. Bogan</i> , 86-ERA-8 (Secretary's Decision, Apr. 1, 1988) .....	39
<i>In re Illinois Power Co.</i> , EA 86-143 (Dec. 17, 1986) .....	20
<i>Lopez v. West Texas Util.</i> , 86-ERA-25 (Secretary's Decision, July 26, 1988) .....	39
<i>Nunn v. Duke Power Co.</i> , A.L.J. Dec., Vol. 1, No. 4, 84-ERA-27 (July-Aug. 1987) .....	20, 39
<i>In re Tennessee Valley Auth.</i> , EA 86-93 (July 10, 1986) .....	20
<i>In re Toledo Edison Co.</i> , EA 88-234 (Nov. 10, 1988) .....	20
<i>Wilson v. Bechtel Constr., Inc.</i> , A.L.J. Dec., Vol. 2, No. 1, 86-ERA-34 (Jan.-Feb. 1988) .....	20
<i>Wood v. Yeargin Constr. Co.</i> , 79-ERA-3 (Secre- tary's Decision, Nov. 8, 1979) .....	24

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

\_\_\_\_\_  
No. 89-152  
\_\_\_\_\_

VERA M. ENGLISH,  
v. *Petitioner,*  
GENERAL ELECTRIC COMPANY,  
*Respondent.*

\_\_\_\_\_  
On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit  
\_\_\_\_\_

**BRIEF FOR RESPONDENT**

**STATEMENT OF THE CASE**

1. Respondent General Electric Company operates a Nuclear Fuel Manufacturing Department in Wilmington, North Carolina. The Wilmington Department is a fuel fabrication plant. It uses "special nuclear material" as defined by the Atomic Energy Act, as amended, 42 U.S.C. § 2014(aa); 10 C.F.R. § 70.4(m), to produce bundles of uranium fuel rods used at nuclear reactor sites to generate electric power.

The Atomic Energy Act grants the Nuclear Regulatory Commission ("NRC") exclusive authority to issue a license for a fuel fabrication plant such as the Wilmington Department. 42 U.S.C. §§ 2073(a), 2077, 2021(b); 10 C.F.R. §§ 70.3, 70.21(a)(1). The Act also gives the NRC exclusive authority to establish such

standards "to govern the possession and use of special nuclear material . . . as the Commission may deem necessary . . . to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b). Pursuant to this authority, the NRC has promulgated comprehensive regulations governing the licensing and operation of fuel fabrication plants (see generally 10 C.F.R. Part 70). These include, for example, regulations governing the safety of workers and of the public (10 C.F.R. Part 20), the need to track and account for the large quantities of special nuclear material used in fuel fabrication (10 C.F.R. § 70.51), and the safety risks of "accidental criticality" that are posed by significant quantities of special nuclear material. 10 C.F.R. §§ 70.22(a)(8), 70.24.<sup>1</sup> The NRC will not issue a license if it "would constitute an unreasonable risk to the health and safety of the public." 10 C.F.R. § 70.31(d).

The Chemical Metallurgical Laboratory ("Chemet Lab") is located within the larger building that houses the Wilmington Department. Chemet Lab workers regularly conduct metallurgical, chemical and spectrographic analyses on uranium samples "to assure that standards of the [NRC] are met." Pet. App. 33a n.3. In performing these tests, employees work with both powder and liquid forms of uranium compounds. *Id.* The quality control responsibilities of the Chemet Lab workers are part of the Department's quality assurance program, which is

<sup>1</sup> The large quantities of special nuclear material used in a fuel fabrication plant pose special safety concerns because they far exceed the quantity needed to form a critical mass (start a self-sustaining nuclear reaction). 10 C.F.R. § 150.11. Thus, to obtain a license from the NRC for a fuel fabrication plant, an applicant must develop "procedures to avoid accidental criticality" (10 C.F.R. § 70.22(a)(8)) and describe how its "handling devices, working areas, shields, measuring and monitoring instruments, devices for the disposal of radioactive effluent and wastes, storage facilities, [and] criticality accident alarm systems" will be sufficient "to protect health and minimize danger to life or property." 10 C.F.R. § 70.22(a)(7), (f).

required by the NRC. 10 C.F.R. Part 50, App. B; 10 C.F.R. § 70.22(f) & n.2.

The Chemet Lab contains several laboratories. In "controlled areas" of these laboratories, specific safety precautions must be strictly observed. Before leaving a controlled area, a hand-held monitor or frisker is used to detect the presence of any radioactive contamination on a person's body or clothing. Workers must wear gloves, a lab coat and safety glasses in both controlled and semi-controlled areas. Pet. App. 33a n.3. The controlled areas contain hoods with fans that pull airborne radioactive contamination away from those working below. In addition, "[s]afety rules require that any spillage of uranium powder or uranium liquid be brushed or cleaned off from time to time during the work hours, and especially before leaving the work shift." *Id.*

2. Petitioner, Vera English, was employed as a radiation laboratory technician at the Chemet Lab for almost twelve years. She was responsible for performing certain quality control tests, "in which samples of uranium powder are weighed, oxidized, weighed again, dissolved in nitric acid and finally weighed again." *Id.* at 34a. Petitioner and other workers used marble work benches with marble legs because the "marble material is not affected by vibrations and is easier to clean than other material." *Id.* at 33a n.3.

On February 13, 1984, petitioner complained to the NRC about "what she perceived" to be violations of safety standards and Company procedures at the Wilmington Department. *Id.* at 7a-8a. On February 24, 1984, petitioner forwarded these same concerns in a written report (dated February 21, 1984) to the Company's Quality Assurance Manager. *Id.* at 8a, 34a.

The Company investigated her complaints on March 8-21 and March 26-30, 1984. *Id.* at 34a. A Chemet Lab Safety Report (dated March 29, 1984) concluded that lab safety procedures were adequate, but a subsequent

Quality Assurance Review (dated April 26, 1984) concluded that some of petitioner's allegations of "violations of company practice and procedure had substance." *Id.* Similarly, the NRC conducted an investigation into petitioner's complaints from March 26 through March 29, 1984. *Id.* at 33a. The NRC subsequently "concluded that [her complaints] were unsubstantiated." *Id.* at 34a.

After reporting her complaints, but prior to the NRC and Company investigations, petitioner (according to her subsequent testimony) took steps "to prove to management that her co-workers were extremely lax in their performance of clean-up duties." *Id.* at 35a. On March 10, 1984, petitioner discovered stains on her work table resulting from a spill of contaminated material. *Id.* at 8a, 34a. Petitioner purposefully chose not to clean the contamination, and decided instead to mark off the stained area with tape "as a warning to fellow workers" and "so she would be able to point it out to her supervisor" when he next returned to the lab. *Id.* at 35a. The contamination stain remained upon the table when she returned to work two days later, despite the interim presence of other shift workers. *Id.* at 8a. Petitioner reported the stain to her supervisor, and also reported to him that a radiation safety employee had failed on March 5 to detect contaminated nuclear material that she had deliberately swept into a pile at the back of her table "to see whether he would discover" it. *Id.* at 8a-9a.

3. On March 15, 1984, respondent charged petitioner with several safety violations, including intentional failure to clean up contamination. *Id.* at 36a-37a. Respondent determined that petitioner had committed the latter violation, relieved her of her laboratory responsibilities, removed her from any controlled areas and assigned her to a temporary position outside the controlled areas. *Id.* at 37a. Petitioner was advised to apply for an open position within the Department, outside of the Chemet Lab. Petitioner did not obtain such a posi-

tion within 90 days, and so was laid off on July 30, 1984. *Id.*

4. On August 24, 1984, petitioner filed a complaint with the United States Department of Labor under Section 210 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. § 5851, and as implemented in 29 C.F.R. § 24.3.<sup>2</sup> Section 210 prohibits employers licensed by the NRC from discharging or changing the "compensation, terms, conditions, and privileges of employment" of any employee in retaliation for that employee's reports about nuclear safety, and entitles employees to full compensatory relief. Section 210 does not apply, however, to any employee who "deliberately causes a violation of [the Energy Reorganization] Act or the Atomic Energy Act, as amended." 42 U.S.C. § 5851(g) ("subsection (g)").

In her Section 210 complaint, petitioner alleged that her transfer from the Chemet Lab, her ultimate layoff and other related actions were taken by the Company in retaliation for her safety complaints. Pet. App. 46a. The Company claimed that under subsection (g), petitioner was not entitled to recovery because she deliberately caused a violation of safety standards by intentionally failing to clean up the spill; the Company also maintained that "the lengths [petitioner] would go to in promoting her views on safety practices" posed "a threat to other employees' safety." *Id.* at 42a. After an initial decision by the Administrator of the Wage and Hour Division, both parties appealed to an Administrative Law Judge ("ALJ"). *Id.* at 31a.

The ALJ conducted a "formal hearing" over 11 days during which "the parties were afforded full opportunity

<sup>2</sup> Petitioner also filed a complaint with the NRC pursuant to 10 C.F.R. § 2.206. See Pet. App. 57a-58a. Although the NRC eventually issued a civil penalty of \$20,000, based solely on the recommended ruling by the Department of Labor's ALJ, the NRC denied petitioner's request for further enforcement actions, including petitioner's request that the NRC impose a civil penalty of over \$40 million. *Id.*



to present evidence and argument," and during which petitioner's psychologist testified concerning the emotional distress petitioner had suffered. *Id.* at 31a, 37a-39a. On August 1, 1985, the ALJ entered an order granting petitioner full compensatory relief. *Id.* at 56a. The ALJ found "little doubt that [petitioner] was a difficult employee to handle," and that "she disrupted workplace activity at times." *Id.* at 41a. The ALJ also recognized that petitioner's intentional failure to clean up the spill "was considered a violation [of the Atomic Energy Act] by NRC." *Id.* at 44a. Nevertheless, the ALJ held that, under the circumstances, petitioner's failure to clean up the spill should be deemed a protected "means of reporting violations, albeit unorthodox." *Id.* at 45a. The ALJ therefore ordered that petitioner be reinstated with back pay plus interest "to make her whole," and awarded her compensatory damages of \$70,000 for past and future medical expenses as recompense for petitioner's "humiliation and mental suffering." *Id.* at 55a.

The Secretary of Labor subsequently reversed the ALJ's decision because petitioner's complaint was not filed within the 30-day limitations period provided in Section 210. On appeal, the Fourth Circuit affirmed the dismissal of petitioner's discharge claim as time-barred, but remanded to permit the Secretary to determine whether petitioner had established a course of retaliatory harassment within the filing time period. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). This case is still pending before the Secretary.

5. On March 13, 1987, petitioner filed a diversity suit against the Company in the United States District Court for the Eastern District of North Carolina. The complaint sought relief under state tort theories of wrongful discharge and "intentional infliction of economic and emotional harm by reprisal and punishment inflicted upon plaintiff in violation of the laws of the United States and North Carolina, with respect to her terms and conditions of employment." J.A. 7. For example, petitioner alleged

that after she reported her safety concerns, the Company removed her from the Chemet Lab under guard, constantly observed her and isolated her from other employees. J.A. 14-15. She also claimed that respondent transferred her to "a degrading 'make work' job" and subsequently discharged her because the Company "desire[d] to punish her for raising safety concerns." J.A. 16. For her two claims for wrongful discharge and intentional infliction of emotional distress, petitioner sought approximately \$1.3 million in compensatory damages and approximately \$2.3 billion in punitive damages. J.A. 21; Pet. App. 6a.

In a lengthy opinion, the district court dismissed the complaint, holding that Congress intended Section 210 to "preempt state actions for wrongful discharge and other discrimination with respect to nuclear whistleblowers." *Id.* at 21a. The court of appeals affirmed, adopting the district court's reasoning and agreeing that Section 210 of the ERA was "intended by Congress to constitute the sole remedy for nuclear facility employees who allege discrimination resulting from safety complaints, and, therefore, English's state law claim was preempted by the federal statute." *Id.* at 3a.

## SUMMARY OF ARGUMENT

### I.

A. Petitioner and her *amici* assume without arguing that Section 210 lies outside the field of nuclear safety. There can be no doubt, however, that the Atomic Energy Act and its progeny, including Section 210, occupy "the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Electric v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212 (1983). At the core of this field is the NRC's exclusive responsibility to ensure that nuclear facilities are licensed and operated in ac-

cordance with public health and safety requirements. 42 U.S.C. §§ 2012(e), 2073(b), 2201(b), 2133(b). One vital component of nuclear safety is the responsibility of all employees at nuclear facilities to report safety violations. 42 U.S.C. § 5846; 10 C.F.R. §§ 19.12, 21.21. The NRC so values these reports that it treats retaliatory employment action against such employees as an independent safety violation requiring serious penalties, including revocation of a license. 47 Fed. Reg. 30,453 (1982); 10 C.F.R. §§ 70.7(c), 19.20. Thus, Section 210, which prohibits such retaliation and protects employees who voice safety concerns, falls squarely within the comprehensive federal regulatory scheme to protect health and safety.

The importance of Section 210 to the framework of federal nuclear safety regulation is reflected in the NRC's regulations, in the legislative history of Section 210 (S. Rep. No. 848, 95th Cong., 2nd Sess. 2 (1978)) and in the structure of Section 210 itself. Section 210 is designed to encourage prompt federal action in response to employer retaliation, and to balance the need to protect the NRC's channels of information against the need to ensure that nuclear employers are not deterred from taking appropriate disciplinary actions. Reflecting Congress's careful and comprehensive concern about promoting nuclear safety, subsection (g) denies protection to alleged "whistleblowers" who deliberately cause violations of safety regulations. 42 U.S.C. § 5851(g). Because Section 210 is an integral part of Congress's exclusively federal scheme of nuclear safety regulation, this case should be analyzed under field preemption principles.

B. It is well settled that any state law that intrudes into an area occupied by the federal government is preempted, even if the state law's purpose is fully consistent with that of the federal government, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947), unless Congress expressly ceded the state authority to act. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-256 (1984).

There can be no doubt that petitioner's claim invades that portion of the nuclear safety field defined by Section 210. *Id.* That provision, *inter alia*, grants petitioner compensatory relief for all claims of discrimination in any term or condition of employment imposed by respondent in retaliation for reporting safety violations. As the district court held, once the claims in petitioner's complaint that allege discrimination in terms and conditions of employment are deleted, what is left does not "in and of itself support a cause of action for intentional infliction of emotional distress" under state law. Pet. App. 28a.

The only remaining issue is whether Congress has expressly ceded North Carolina authority to regulate safety in the nuclear workplace through the use of its tort laws. The answer is clearly no. Neither petitioner nor her *amici* present one shred of evidence that Congress enacted Section 210 with the understanding that states could supplement the federal remedies with tort actions. Nor is there any basis for concluding that Congress did not preempt petitioner's claim because the State's purpose is not to regulate nuclear safety. Contrary to the argument of the Solicitor General, it is black letter law under the Supremacy Clause that it is irrelevant whether the state and federal laws "are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Accordingly, petitioner's claim is preempted by Section 210.

## II.

Even if Section 210 could be interpreted as outside the federally occupied field of nuclear safety, it is nevertheless plain that permitting petitioner's claims to be litigated in state court will "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Specifically, Congress intended to make certain that claims regarding retaliation were filed



promptly, and to balance the need to encourage employees to come forward with safety concerns against the need not to deter employers from taking appropriate disciplinary action to assure safe operations in a nuclear facility.

The district court correctly identified the elements of Section 210 that are jeopardized by state law: the 30-day time limit for filing; an administrative claim, the preclusion of relief for employees who deliberately violate a safety requirement and the decision to entrust only the Secretary with the discretion to seek punitive damages. Allowing state tort actions to be filed years after a safety problem exists (even if the problem is the employer's willingness to retaliate), and allowing damages to be awarded to employees without an expert evaluation of the regulatory and safety questions at issue will inevitably frustrate the achievement of Section 210's safety-related purposes.

Allowing employees to obtain punitive damages, moreover, will completely vitiate Congress's effort to promote safety through a balanced administrative scheme. It is simply inconceivable that a plaintiff's lawyer will be content to settle for the compensatory and back pay relief that Section 210 provides when state law holds out the promise of a *billion* dollar punitive award and the settlement leverage such an award offers. Moreover, the availability of a large punitive award creates the perverse incentive that the worst abuses by nuclear facilities would be precisely the ones a plaintiff would most want to bring only in state court, thereby depriving the NRC of information vital to nuclear safety. The repudiation of Congress's intent to encourage prompt administrative filings and not to deter employer responses to safety problems created by employees clearly must be preempted.

### III.

Petitioner and her *amici* urge the Court to resolve this case under labor preemption principles. Although the case is more properly analyzed as a nuclear safety case,

the analogy to the labor laws provides an independent basis for affirming the judgment below.

By providing a specialized forum for evaluating workplace issues in an area—nuclear safety—traditionally regulated by the federal government, Congress in Section 210 has created a remedial scheme similar to the scheme administered by the National Labor Relations Board. The case that most closely fits this one under this labor analogy is *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977). But in that case, this Court did not hold that all claims for intentional infliction of emotional distress survive the existence of a federal remedy. Instead, the Court held that "it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened . . . ." *Id.* at 305. As noted above, the district court, applying the analysis in *Farmer*, held that once the employment discrimination claims are severed from the complaint, the remainder does not state a claim under state law. Thus, even apart from the federal interest in nuclear safety, petitioner's claim is preempted under traditional labor preemption principles.

### ARGUMENT

The general principles of preemption are accurately described in the Solicitor General's brief (S.G. Br. 9-11) and need not be repeated here. Suffice it to say that petitioner's state law claim is preempted under both of two independent theories: Her claim (1) directly invades the field of nuclear safety which Congress has occupied exclusively for over 40 years and (2) creates an insuperable obstacle "to the accomplishment and execution of the full purposes and objectives of Congress" and therefore conflicts with the specific elements of Section 210. *Hines v. Davidowitz*, 312 U.S. 52, 37 (1941). In addition, her claim is preempted under well-settled principles of labor law preemption, which provide a useful analogy in



analyzing the Supremacy Clause issue in this case. We address each ground of preemption in turn.

**I. A STATE LAW CLAIM FOR INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS ARISING OUT OF RETALIATORY EMPLOYMENT ACTIONS AT A NUCLEAR FACILITY INVADES THE FIELD OF NUCLEAR SAFETY AND OPERATIONS AND IS THEREFORE PREEMPTED.**

The Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*, and the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §§ 5801 *et seq.*, exclusively reserve the entire field of nuclear safety to federal control. Congress has given the NRC exclusive authority over the licensing and regulation of nuclear facilities, and pursuant to this authority the Commission has enacted detailed regulations in furtherance of its paramount responsibility to protect the public from the health and safety hazards of nuclear operations. Any state law that, in effect, regulates the safe operation of a nuclear facility, regardless of its purpose or its potential to disrupt the federal scheme, is preempted to the extent it trespasses in this exclusively federal area. *Pacific Gas & Electric*, 461 U.S. at 212-213; see, e.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 183-84 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231-36 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

**A. Congress Has Preempted The Entire Field Of Nuclear Safety And Operations.**

In *Pacific Gas & Electric*, 461 U.S. at 205-212, this Court reviewed in detail the statutory language, structure and legislative history of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* Based on this review, the Court concluded that “the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.” 461 U.S. at 212. In this, as in any preemption case, the touchstone of analysis is Congress’s intent to preempt.

*Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 152 (1982). The Atomic Energy Act provides the basic framework against which Congress’s decision in 1978 to enact Section 210 must be interpreted.

As this Court explained in *Pacific Gas & Electric*, “[t]he Atomic Energy Act must be read” for preemption purposes against the unique background of exclusive federal control over nuclear energy. 461 U.S. at 206. Congress passed the Atomic Energy Act in 1954 to end the prior federal monopoly over all aspects of nuclear technology and allow private industry to participate in the commercial development of nuclear technology under a scheme of exclusive federal regulation and licensing. 461 U.S. at 207. In particular, Congress expressly reserved to the federal government the right to regulate nuclear facilities to assure the protection of health and safety.<sup>3</sup> *Id.* Congress gave the Atomic Energy Commission exclusive licensing authority for the possession and distribution of special nuclear material (42 U.S.C. §§ 2073, 2077), and empowered the Commission to establish such regulations “to govern the possession and use of special nuclear material . . . as the Commission may deem necessary . . . to protect health or to minimize danger to life or property.” 42 U.S.C. § 2201(b).

The Atomic Energy Act of 1954 preserved intact the dual federal/state regulatory structure over the *sale and transmission* of commercial electric energy (42 U.S.C. § 2019), but did not provide any other regulatory role for the states, especially a safety role. In 1959, after extensive hearings on federal and state roles in regulating nuclear power, Congress added Section 274, which created only a limited role for states in the nuclear regulatory scheme—and then only by express agreement

<sup>3</sup> See 42 U.S.C. § 2012(e) (“regulation *by the United States* of the production and utilization of atomic energy and of the facilities used in connection therewith *is necessary* in the national interest to assure the common defense and security and *to protect the health and safety of the public*”) (emphasis added).

with the Commission.<sup>4</sup> 42 U.S.C. § 2021. Notably, Section 274 allowed the Commission to grant the states regulatory authority only for byproduct, source and "special nuclear materials in quantities not sufficient to form a critical mass." 42 U.S.C. § 2021(b). Congress thus carefully preserved the Commission's exclusive authority over other aspects of nuclear safety, including the licensing and regulation of plants, such as respondent's Wilmington Department, that use special nuclear materials in quantities far greater than that needed "to form a critical mass."<sup>5</sup> *Id.*; see 10 C.F.R. § 150.11 (defining critical mass). As this Court concluded in *Pacific Gas & Electric*, by reaffirming the exclusivity of federal authority over the field of nuclear safety concerns, the 1959 Amendments "reinforced th[e] fundamental division of authority" between the Commission and the states under which the states may share limited commercial regulation but the federal government has exclusive responsibility for nuclear safety. 461 U.S. 208.<sup>6</sup>

<sup>4</sup> Congress also authorized the Commission to terminate any such agreement with a State "if the Commission finds that such termination or suspension is required to protect the public health and safety." 42 U.S.C. § 2021(j).

<sup>5</sup> In adding Section 274, therefore, Congress was careful not to create even the possibility that a state could regulate the health and safety aspects of a fuel fabrication facility such as the Wilmington Department. In any event, North Carolina does not have an agreement with the Commission to regulate even limited quantities of special nuclear materials.

<sup>6</sup> As the AEC explained during hearings on Section 274, "[q]uantities of special nuclear material which may present hazards of accidental criticality are excluded from the scope of the bill . . . . As a consequence . . . such activities as the processing of special nuclear material, fabrication of fuel elements and similar activities will remain subject to the licensing requirements and other regulatory controls of the Commission." *Federal-State Relationships in Atomic Energy Field, Hearings Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. 297 (1959) (emphasis added).

Moreover, the Senate Report accompanying the 1959 amendments confirms that they were "not intended to leave any room for the

Subsequent developments underscore both Congress's awareness of and commitment to exclusive federal control over the operation and safety of nuclear facilities.<sup>7</sup> In 1969, for example, the General Counsel of the AEC published in the Federal Register the Commission's view that Congress, in amending the Atomic Energy Act in 1959, "*intended to preempt to the Federal Government the total responsibility and authority for regulating, from the standpoint of radiological health and safety, the specified nuclear facilities and materials.*" 10 C.F.R. § 8.4(i) (emphasis added); see 10 C.F.R. § 8.4(d) (recounting history of 1959 amendments).

In 1974, Congress passed the Energy Reorganization Act, 42 U.S.C. §§ 5801 *et seq.*, which abolished the AEC and transferred its regulatory and licensing authority to the NRC. 42 U.S.C. § 5841(f). The 1974 Act also ex-

---

ercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source, or special nuclear materials." S. Rep. No. 870, 86th Cong., 1st Sess., reprinted in 1959 U.S. Code Cong. & Admin. News 2872, 2879; see *id.* (recognizing "the dangers of conflicting, overlapping and inconsistent standards in different jurisdictions, to the hindrance of industry and jeopardy of public safety").

<sup>7</sup> This Court and numerous courts of appeals have consistently recognized the Commission's exclusive responsibility for ensuring nuclear safety. See *Power Reactor Dev. Co. v. International Union*, 367 U.S. 396, 404, 415 (1961) ("the responsibility for safeguarding that [public] health and safety belongs under the statute to the Commission"); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 526, 550 (1978) (NRC's "prime area of concern . . . is national security, public health, and safety"); *Northern States Power Co. v. State of Minnesota*, 447 F.2d 1143, 1150 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); *County of Rockland v. N.R.C.*, 709 F.2d 766, 770 (2d Cir.), *cert. denied*, 464 U.S. 993 (1983); *Rockford League of Women Voters v. N.R.C.*, 679 F.2d 1218, 1223 (7th Cir. 1982); *Porter County Chapter v. N.R.C.*, 606 F.2d 1363, 1370, 1372 (D.C. Cir. 1979); *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778 (D.C. Cir. 1968); *State of New Hampshire v. Atomic Energy Comm'n*, 406 F.2d 170 (1st Cir.), *cert. denied*, 395 U.S. 962 (1969); *Reynolds v. United States*, 286 F.2d 433 (9th Cir. 1960).



panded the number and range of safety responsibilities charged to the NRC, *e.g.*, 42 U.S.C. §§ 5843(b)(2) (A)-(B), 5844(b), 5877(c)), and (in Section 206) imposed new safety-related reporting requirements on responsible officers and directors of licensees. 42 U.S.C. § 5846. Finally, in 1978, Congress passed a set of amendments (including several that were safety-related) to both the Atomic Energy Act and the Energy Reorganization Act. Pub. L. No. 95-601, 92 Stat. 2947 (1978). Among them is Section 210, which encourages employees to report safety violations to the NRC, and provides the mechanism for protecting them against retaliation for doing so—unless they have deliberately violated safety regulations.

#### **B. Section 210 Lies Squarely Within The Field Of Nuclear Safety Concerns.**

Section 210 falls squarely within the field of nuclear safety concerns because it is intended to assist the NRC in carrying out its exclusive responsibility to ensure that nuclear facilities are licensed and operated in a manner consistent with public health and safety. The essential purpose of Section 210 is to ensure that employees are not deterred from performing "their responsibility to report promptly" to the NRC (10 C.F.R. § 19.12) by fear of retaliatory employment action.<sup>8</sup>

Section 210(a) states that no employer in the nuclear industry "may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment

<sup>8</sup> Respondent uses the term "retaliatory employment action" as a shorthand reference to the scope of conduct prohibited by Section 210. It is important to note that, by its plain terms, Section 210 covers neither all retaliatory acts nor all changes in the terms and conditions of employment. Instead, Section 210 covers only conduct that involves both of these concerns—retaliation for whistleblowing that takes the form of discharge or other changes in "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 5851(a). See pages 28-29, *infra*.

because the employee" has taken one of the following actions:

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;
- (2) testified or is about to testify in any such proceeding or;
- (3) assisted or participated . . . in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851(a). Any employee who believes that he or she has been the victim of such retaliation may file a complaint with the Secretary of Labor within 30 days after the violation occurs. *Id.* § 5851(b)(1). The Secretary, who promptly notifies the NRC upon receipt of the complaint (47 Fed. Reg. 54,585), is required to conduct and complete an investigation within 30 days, and to issue an order within 90 days either dismissing the complaint or providing appropriate relief. Should a violation be found, the Secretary is authorized to award comprehensive injunctive relief and monetary "compensation."<sup>9</sup> Should an employer fail to comply with the Secretary's order, the Secretary is authorized "to file a civil action" in federal district court and has discretion to seek "all appropriate relief including, but not limited

<sup>9</sup> See 42 U.S.C. § 5851(b)(2)(B) ("the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant"); see also *id.* (providing for recovery of costs and attorney's fees).



to, injunctive relief, compensatory, and exemplary damages." 42 U.S.C. § 5851(d) (emphasis added).

1. The NRC's regulations implementing Section 210 and other provisions of the Energy Reorganization Act and Atomic Energy Act confirm that Section 210 is an integral part of the federal government's long-established exclusive authority to regulate the use of special nuclear materials and the safe operation of nuclear facilities. 42 U.S.C. §§ 2073(b), 2201(b), 2133, 2137, 5841(f). Pursuant to this authority, the NRC has adopted a comprehensive enforcement program, "the purpose" of which "is to promote and protect the radiological health and safety of the public, including employees' health and safety." 10 C.F.R. Part 2, App. C at 129-30. The NRC imposes detailed record-keeping and reporting requirements upon licensees such as respondent, and periodically conducts inspections to monitor compliance.<sup>10</sup> To assist the NRC in this oversight, Congress, in Section 206 of the Energy Reorganization Act, placed a special obligation on "any individual director or responsible officer" of a licensee: such persons must "immediately notify the Commission" of any failure to comply with any Commission rule or regulation related to certain safety hazards, and failure to report certain specified hazards may result in civil fines. 42 U.S.C. § 5846; 10 C.F.R. §§ 21.1, 21.21, 21.61; see 10 C.F.R. Part 2, App. C at 132.

The NRC's regulations also reveal the importance it places on receiving reports from *employees* concerning

<sup>10</sup> See, e.g., 10 C.F.R. § 70.51 (material balances, inventory and record-keeping requirements); 10 C.F.R. § 70.52 (accident, loss and theft reporting requirements); 10 C.F.R. § 70.53 (material status reporting requirements); 10 C.F.R. § 70.54 (nuclear material transfer reporting requirements); 10 C.F.R. § 70.55 (NRC inspection requirements); 10 C.F.R. § 70.56 (licensee and NRC testing requirements); 10 C.F.R. § 70.57 (nuclear material measurement control program); 10 C.F.R. § 70.58 (fundamental nuclear material controls); 10 C.F.R. § 70.59 (effluent monitoring reporting requirements).

possible safety violations. Although employees, unlike directors and responsible officers, are not subject to civil penalties for a failure to report safety problems, the NRC has taken a number of steps to encourage them to notify the Commission of any violations they discover. The regulations require, for example, that employers establish procedures to ensure that responsible officers and directors in fact receive employees' reports of safety problems (10 C.F.R. § 21.21(a)(2)); in addition, employees must be "instructed of *their responsibility to report* promptly to the licensee any condition which may lead to or cause a violation of Commission regulations and licenses" (10 C.F.R. § 19.12) (emphasis added); allowed "to consult privately" with Commission inspectors during facility inspections concerning matters that may relate to "any violation of the [Atomic Energy] act" (10 C.F.R. §§ 19.14, 19.15); and allowed to "request" that the NRC conduct an inspection (10 C.F.R. § 19.16).

The NRC's regulations implementing Section 210 demonstrate that this provision, like Section 206, plays an integral role in ensuring that the NRC receives the information it needs to ensure safe operation of nuclear facilities. The Commission itself has explained that "to effectively fulfill its mandate, [the NRC] requires complete, factual, and current information concerning the regulated activities of its licensees. Employees are an important source of such information and should be encouraged to come forth with any items of potential significance to safety without fear of retribution from their employers." 47 Fed. Reg. 30,453 (1982); see also Pet. App. 41a ("The need to protect channels of information from being dried up by employer intimidation is the purpose of the Act"). Accordingly, "to ensure that employees are aware that employment discrimination for . . . contacting the Commission is illegal and that a remedy exists," the Commission has developed a standard form (Form NRC-3) that alerts employees to their reporting responsibilities and the protection afforded them by Section 210. 47 Fed. Reg. 30,453. The Commission

requires all licensees to keep this form posted "at locations sufficient to permit employees protected by [Section 210] to observe a copy on the way to or from their place of work." 10 C.F.R. § 70.7(e). Moreover, the NRC has entered into an agreement with the Secretary of Labor to ensure that it promptly receives notice of any Section 210 claim filed with the Secretary and can "cooperate to the fullest extent possible" in the investigation. 47 Fed. Reg. 54,585 (1982).<sup>11</sup>

Most telling, however, is the significance that the NRC places on retaliation against those who report safety concerns. Proof of such retaliation by a licensee is itself a safety concern so serious that it is grounds for, among other penalties, "denial, revocation, or suspension of the license." 10 C.F.R. § 70.7(c). See 10 C.F.R. Part 2, App. C at V.D and Supp. VII.A.4, B.4, C.4 (retaliation deemed comparable in severity to other "serious" safety violations). Accordingly, the NRC has investigated and punished licensees who retaliate against employees who raise safety concerns. See, e.g., *In re Toledo Edison Co.*, EA 88-234 (Nov. 10, 1988) (modifying license and imposing \$80,000 fine); *In re Tennessee Valley Auth.*, EA 86-93 (July 10, 1986) (\$150,000 fine); *In re Illinois Power Co.*, EA 86-143 (Dec. 17, 1986) (\$50,000 fine); see also note 2, *supra*.

2. The NRC's integration of Section 210 into its core safety and licensing responsibility is fully consistent with Congress's intent. Indeed, it is apparent from the legislative history and structure of Section 210 that Congress intended to integrate this provision into the broader

<sup>11</sup> The Secretary of Labor has recognized the employee's important role in providing information to the NRC. See, e.g., *Nunn v. Duke Power Co.*, A.L.J. Dec., Vol. 1, No. 4, 84-ERA-27 (July-Aug. 1987) (As set out in Form NRC-3, "violations of NRC rules should be reported immediately to the employee's supervisor and if adequate corrective action is not taken, then to N.R.C."); *Wilson v. Bechtel Constr., Inc.*, A.L.J. Dec., Vol. 2, No. 1, 86-ERA-34 (Jan.-Feb. 1988) (same).

scheme of nuclear safety regulation over which it had given the NRC exclusive control. As the Senate Report accompanying Section 210 explains, "[u]nder this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act." S. Rep. No. 848, 95th Cong., 2nd Sess. 2, reprinted in 1978 U.S. Code Cong. & Admin. News 7303, 7304. Rep. Udall, in alerting his colleagues in the House to the Senate bill in which the language of Section 210 first appeared, underscored the link between the NRC's exclusive responsibility for ensuring nuclear safety and the role of Section 210:

[T]he other body does have language in its bill dealing with the subject of whistleblower protection, language which I look upon sympathetically. . . . I, for one, believe that *the NRC must be able to protect its sources of information to do an effective job of protecting the health and safety of the American people.*

124 Cong. Rec. 33,255 (1978) (emphasis added).<sup>12</sup>

Moreover, the structure of Section 210 confirms what the legislative history makes plain, which is that Congress viewed employee protection in the nuclear context not simply as an end in itself, but as a *means* to the ultimate end of enhancing nuclear safety.<sup>13</sup> For example, if employee protection were the only significant purpose for Section 210, then the requirement that any complaint

<sup>12</sup> See also 124 Cong. Rec. 29,769 (1978) (statement of Sen. McClure) ("Finally, the Committee has recommended a provision to protect any worker who is discriminated against by his employer for providing assistance to the NRC in the discharge of its regulatory responsibilities") (emphasis added); Pet. App. 18a-19a ("the legislative history" of Section 210 indicates that safety concerns are "inextricably intertwined" with employee protection).

<sup>13</sup> See *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983) ("The purpose of the Act is to prevent employers from discouraging cooperation with NRC investigators, and not merely to prevent employers from inhibiting disclosure of particular facts or types of information").



be brought within 30 days of the alleged violation would seem unnecessarily strict. But this short time-requirement makes perfect sense given the broader recognition, explicit in the NRC regulations, that the fact of employer retaliation is itself a serious safety concern: The NRC views retaliation as an independent basis for revoking or modifying a license, and as an action which should be reported to the NRC without delay.<sup>14</sup> See page 20, *supra*.

The structure of Section 210 also reflects Congress's awareness that whistleblower protection, while critical to achieving optimal workplace safety, nevertheless carries its own threat to safety if abused. This recognition of the need to balance the provision of employee protection against the broader concern of ensuring overall workplace safety is explicit in subsection (g). This provision denies statutory protection "to any employee who, acting without direction from his or her employer . . . deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended." 42 U.S.C. § 5851(g). The Senate Report explains that Congress added subsection (g) "to avoid abuse of the protection afforded under this section" (S. Rep. No. 848 at 30).

<sup>14</sup> *Amici* National Conference of State Legislatures, *et al.* ("NCSL") relies (Br. 17) upon Congress's decision to use the Secretary of Labor to administer Section 210 as evidence that Congress did not intend to use that provision to promote safety concerns. But the memorandum of understanding between the NRC and the Secretary (47 Fed. Reg. 54,585) reveals clearly the closeness of the relationship between Section 210 and the NRC's plenary authority to control safety in the operations of a nuclear facility. It seems obvious that Congress chose the Secretary of Labor to receive these complaints in order to encourage individuals to file them. Congress recognized that employees, such as petitioner, who have attempted without success to bring a safety concern to the attention of the NRC would be more willing to file a complaint if it would be heard by a neutral, third party. Thus, the Secretary's role is fully consistent with the provision's purpose of promoting safety in the operation of a nuclear facility.

By excluding from coverage those employees who themselves have deliberately caused a safety or other violation, Congress intended subsection (g) to assure employers that they can take appropriate measures to discipline employees who deliberately create safety hazards, without running a significant risk of liability. As petitioner's own conduct illustrates, the question whether an employee has deliberately violated safety regulations and thereby poses a threat to the health and safety of workers and the public lies at the heart of the safe operation of a nuclear facility. In the context of four decades of exclusive federal control over nuclear safety, "[i]t is unlikely—to say the least—that Congress intended" to allow this vital question to be resolved under "a variety of common-law rules," *International Paper Co. v. Ouellette*, 479 U.S. 481, 496-97 (1987), or to allow tort actions in state courts to strip employers of the immunity so carefully built into subsection (g), when the alleged "whistleblower" is also a safety violator. The inclusion of subsection (g) alone establishes that Congress intended Section 210 to operate as an integral part of the system of exclusive federal control over nuclear safety.

Congress's approach to the controversial and important subject of punitive damages is also revealing. If Congress's sole interest was to encourage workers to bring complaints by deterring retaliation, it would have authorized employees to obtain punitive damages<sup>15</sup> (and might well have dispensed with administrative review altogether). Instead, Section 210(b)(2)(B) authorizes only the Secretary to seek punitive damages, and then only when the employer has compounded the underlying violation by flouting the Secretary's remedial order. 42 U.S.C. § 5851(d). It is desirable, for safety reasons, for employers not to be deterred from taking appropriate disciplinary action, and the clear limit in Section 210 on

<sup>15</sup> Whistleblower-protection provisions in two other statutes expressly allow the employee to seek punitive damages. See Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(2)(B)(ii); Toxic Substances Control Act, 15 U.S.C. § 2622(b).



the use of punitive damages reflects the statute's overall purpose of enhancing the safe operation of nuclear facilities.<sup>16</sup>

As this Court has often observed, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), quoting *Northwest Airlines, Inc. v. Transport Workers, Inc.*, 451 U.S. 77, 97 (1981). Moreover, as with other statutes providing comprehensive enforcement procedures, in construing Section 210 the Court may reasonably conclude that important "policy choices [are] reflected in the inclusion of certain remedies and the exclusion of others. . . ." *Pilot Life Ins. Co. v. DeDeaux*, 481 U.S. 41, 54 (1987). Here, Congress's decision to allow only the Secretary, and not employees, to seek punitive damages makes eminently good sense in light of the overall safety purposes of Section 210.

Given the long history of exclusive federal control over nuclear energy, Congress is presumed to have been aware when it added Section 210 to the Energy Reorganization Act that it was legislating in an area of exclusive federal control. *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). Indeed, Congress could not have chosen simply to build on existing state remedies because the aspect of

<sup>16</sup> See, e.g., *Guy v. Travenol Laboratories, Inc.*, 812 F.2d 911, 917 (4th Cir. 1987) (recognizing the "danger that the always uncertain prospects of [wrongful discharge] litigation will deter employers . . . from legitimate personnel decisions"); *Dartey v. Zack Co.*, 82-ERA-2, slip op. 11 (Secretary's Decision, April 25, 1983) (employer "may well have been justified in firing" employee, but instead suspended him "out of an excess of caution because . . . it was mindful of the protections of section 5851"); *Wood v. Yeargin Constr. Co.*, 79-ERA-3, slip op. 8-9 (Secretary's Decision, Nov. 8, 1979) (dismissing section 210 claim and noting that "[i]n view of the risk to the plant and public offered by [employee's] propensities, his discharge was overdue when it occurred").

employee protection at issue here (unlike in *Silkwood*) is not a traditional area of state concern. When Congress enacted Section 210 in 1978, the vast majority of states did not even recognize a cause of action for wrongful discharge,<sup>17</sup> and state law with regard to "intentional infliction of emotional distress" was no more clear or consistent than it is today. See *Atchinson, T. & S. F. Ry. v. Buell*, 480 U.S. 557, 568-70 & nn. 17-19 (1987) (discussing at length "the doctrinal divergences" in state law on intentional infliction of emotional distress).

3. Petitioner and the United States assert, but do not argue directly, that Section 210 lies outside the field of nuclear safety regulation. Pet. Br. 22 n.9; S.G. Br. 12.

<sup>17</sup> Under the at-will doctrine, terminated employees cannot recover damages under a cause of action for wrongful, abusive or retaliatory discharge. By 1978 only ten states had recognized a cause of action where an employer terminated an employee in clear contravention of a strong public policy of the state or in bad faith. See *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25 (Cal. 1959); *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975); *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. 1976); *Jackson v. Minidoka Irrigation Dist.*, 563 P.2d 54 (Idaho 1977); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *O'Sullivan v. Mallon*, 390 A.2d 149 (N.J. 1978); *Harless v. First National Bank*, 246 S.E.2d 270 (W. Va. 1978); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. 1978). Moreover, when Section 210 was enacted, eight states had expressly rejected such a cause of action. See *Raley v. Darling Shop of Greenville, Inc.*, 59 S.E.2d 148 (S.C. 1950); *Stephens v. Justiss-Mears Oil Co.*, 300 So.2d 510 (La. App. 1974); *Yanta v. Montgomery Ward & Co., Inc.*, 224 N.W.2d 389 (Wis. 1974); *Hinrichs v. Tranquillaire Hospital*, 352 So.2d 1130 (Ala. 1977); *Segal v. Arrow Industries Corp.*, 364 So.2d 89 (Fla. App. 1978); *Georgia Power Co. v. Busbin*, 250 S.E.2d 442 (Ga. 1978); *Scrogan v. Krafco Corp.*, 551 S.W.2d 881 (Ky. App. 1977); *Dockery v. Lampart Table Co.*, 244 S.E.2d 272 (N.C. App. 1978). While today at least 26 states allow common law exceptions to the at-will doctrine, whether a discharged employee can recover depends upon the particular state's law. Thus, when Congress enacted Section 210, it did not impose an administrative scheme upon an area traditionally regulated by the states.

They attempt to hide behind the district court's statement that the "paramount purpose" of Section 210 is not to promote nuclear safety (Pet. App. 19a), and move on to argue against preemption on other grounds. But the district court's observation provides no real shelter, for two reasons. First, as the foregoing discussion illustrates, the district court simply erred in viewing Section 210 apart from its statutory context and history. Second, the district court asked the wrong question. By stating that "[t]he question, therefore, is whether Congress put safety or employee protection first" (Pet. App. 19a), the district court implied that Section 210 could have only one significant purpose. Statutes as complex as Section 210 typically have multiple purposes, however, and the relevant question for preemption purposes is whether promoting nuclear safety is at least *one* of Section 210's important purposes. The NRC's regulations alone establish that Section 210 is an integral part of the NRC's exclusive and core responsibility to ensure the safe operation of nuclear facilities.

The Solicitor General's further argument that Section 210, as a single provision, cannot "occupy a 'field'" (S.G. Br. 8) is similarly without merit. By asking the Court to view Section 210 in isolation from the statute it amended, the Solicitor General arbitrarily compartmentalizes the analysis. The Solicitor General's approach would have merit if Congress had enacted Section 210 alone as a private, federal cause of action and had not enacted the Atomic Energy Act or the Energy Reorganization Act. Compare *California v. ARC America Corp.*, 109 S.Ct. 1661 (1989) (passage of one remedial statute does not necessarily preempt complementary state remedial action). But Congress enacted Section 210 as an integral part of the entire package of nuclear safety legislation. A proper field-preemption analysis, no less than any proper statutory analysis, must take into account the broader statutory framework of which a particular provision is simply one part. *E.g.*, *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474

U.S. 409, 422-23 (1986). Section 210's statutory structure confirms what is apparent from the legislative history and from the NRC's implementing regulations: Congress intended Section 210 to be interpreted as an important part of the broader scheme of federal nuclear safety legislation that defines an area of exclusive federal control, off limits to all state regulation—that which conflicts *and* that which may complement the federal scheme.

**C. Section 210 Preempts State Law Claims For Intentional Infliction Of Emotional Distress That Arise Out Of Retaliatory Employment Action For Whistleblowing At A Nuclear Facility.**

1. Because Section 210 falls squarely within "the entire field of nuclear safety concerns" (*Pacific Gas & Electric*, 461 U.S. at 212) over which Congress has given the federal government exclusive authority, it necessarily follows that Congress has displaced state law remedies for this same conduct. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250-51, 256 (1984) (acknowledging that state tort law remedies can intrude into the field of nuclear safety regulation). As the district court correctly recognized, virtually all of the conduct supporting petitioner's claim for intentional infliction of emotional distress is conduct related to the "terms, conditions, and privileges of employment" for which Section 210 provides a comprehensive compensatory remedy. Pet. App. 18a, 28a; J.A. 7. To determine, as a matter of state law, whether these changes in the terms of employment constituted "outrageous conduct" or were instead an appropriate response, consistent with subsection (g), to an employee who posed a significant risk to workplace safety, the jury would necessarily be forced to consider and resolve questions of the proper operation of a nuclear facility that Congress intended the Secretary of Labor, in consultation with the NRC, to address.<sup>18</sup>

<sup>18</sup> The proceeding before the ALJ in this case illustrates the overlap between petitioner's state law claim and the scope of Section 210. The ALJ held 11 days of hearings, heard testimony from petitioner's psychologist concerning her emotional distress, and



It is worth emphasizing that the preemption of state tort law in this context is not an all-or-nothing proposition. A proper preemption analysis requires a court to examine the state law claim against the field that Congress has occupied. Section 210 provides a safety-related mechanism for protecting employees in the nuclear industry against retaliatory employment action for their legitimate attempts to report safety concerns. Federal law preempts this subject, even if the employee characterizes the employer's employment-related discipline as a tort. To the extent the employee's claim arises from conduct clearly outside the scope of Section 210, however, state law is not displaced. See note 8, *supra*.

In this case, the district court performed precisely this analysis. Although it held that petitioner's allegations stated a claim for intentional infliction of emotional distress, it also held that what is left of petitioner's complaint after removing those allegations that are within the ambit of Section 210 "would not in and of itself support a cause of action" under North Carolina law for intentional infliction of emotional distress. Pet. App. 28a. This interpretation of state law by a district judge sitting in North Carolina, which was affirmed by the court of appeals, is ordinarily not subject to review by this Court,<sup>19</sup> and has never been challenged by petitioner and her amici. Nor could it be.<sup>20</sup>

awarded petitioner \$70,000 damages "as recompense for [her] humiliation and mental suffering." Pet. App. 37a-39a, 55a. See also *id.* 45a-46a n.8 (Secretary "must determine whether Claimant's overall conduct was so generally inimical to Employer's interests and so excessive as to be beyond the protection of the statute . . . [and] balance the setting in which the activity arises and the interests and motivations of both Employer and Employee").

<sup>19</sup> See, e.g., *Bowen v. Massachusetts*, 108 S.Ct. 2722, 2739 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-30 (1946).

<sup>20</sup> The district court's interpretation is plainly correct. In interpreting a complaint in this area, a court must be guided by the

Petitioner therefore is simply wrong in arguing (Pet. Br. 18) that if this Court holds her particular tort claim preempted, then it must hold that all tort claims against an employer are preempted. Petitioner contends that if respondent "decided to retaliate against Ms. English for her activities by hiring some 'thugs' and actually *physically* assaulting her, the decision below leaves her with no remedy for injuries and medical bills." *Id.* Nonsense. A decision to hire thugs to assault an employee is hardly a decision to change the "terms, conditions, and privileges of employment" within the meaning of Section 210. This Court has never had difficulty distinguishing between claims for "intentional infliction of emotional distress" arising out of changes in the terms and conditions of employment and similar claims arising out of other illegal conduct. *E.g.*, *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 303-07 (1977). Thus, in holding petitioner's claim preempted in this case because it is based on the same employment-related conduct addressed by Section 210, this Court need not and should not reach out to preempt state law remedies for injuries inflicted on whistleblowing employees through conduct other than that "arguably within the compass of" Section 210, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).<sup>21</sup>

rule that "compliance with the intent of Congress cannot be avoided by mere artful pleading." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981). Here, dismissal of the complaint is consistent even with petitioner's broadest allegations. Her claims of ridicule and harassment are allegations which by definition will exist almost always whenever an employee is subjected to discriminatory terms and conditions of employment. These allegations are fully cognizable under Section 210. *English v. Whitfield*, 858 F.2d 957, 963-64 (4th Cir. 1988).

<sup>21</sup> In evaluating the sweep of the preempted field defined by Section 210, the Court should employ the same standard embraced for labor law preemption, viz., there can be no remedy under state law for conduct that either is prohibited or is "arguably" prohibited by Section 210. *Garmon*, 359 U.S. at 246. This rule fully protects the federal interest while allowing the states to provide remedies



2. In *Pacific Gas & Electric*, this Court affirmed the principle that when Congress has preempted a field, state law that intrudes into that field is preempted, regardless of its purpose or potential for conflict, unless there is evidence that Congress "expressly ceded to the States" the authority to act. *Id.* at 212. Thus, the appropriate analytic framework in this case is precisely the opposite of that put forth by petitioner and her *amici*. This is not a situation where the Company must demonstrate manifest congressional intent to preempt this specific state tort rule; the "special features" of the congressional scheme regulating nuclear safety establish Congress's preemptive intent. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638 (1973). Instead, it is incumbent upon petitioner to demonstrate that Congress specifically intended to authorize a tort action that overlaps with a Section 210 proceeding.

In both *Pacific Gas & Electric* and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court upheld state laws that operated in fields where Congress had expressly ceded the states a role. In *Pacific Gas & Electric*, the Court upheld the California moratorium on new plant construction because Congress had expressly conferred upon the states the right "to determine—as a matter of economics—whether a nuclear plant . . . should be built." 461 U.S. at 222.

In *Silkwood*, the Court recognized that allowing state law remedies for those injured by radiation in a nuclear plant intruded on the exclusive field of nuclear safety. *Id.* at 250-51, 256. The Court upheld the state law at issue in *Silkwood* against field preemption, however, because it found express evidence in the legislative history

for conduct that simply has nothing to do with Section 210. Thus, for instance, because acts of violence are not arguably within Section 210's prohibition, state law torts for assault or battery would not be preempted.

of the Atomic Energy Act,<sup>22</sup> consistent with the test established in *Pacific Gas & Electric*, 461 U.S. at 212, that "Congress assumed that traditional principles of state tort law would apply with full force" to compensate those who suffered radiation injuries, and "intended . . . to tolerate whatever tension" might result with the NRC's exclusive authority over nuclear safety. 464 U.S. at 255-56. The Court found further support in the fact that Congress had *not* provided any comparable remedy for victims of radiation. *Id.* at 251. In so holding, the Court emphasized that its holding was a narrow one limited to "damages for radiation injuries," and was *not* intended to "suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law." *Id.* at 256.

There has been no showing in this case, nor could there be a showing, that Congress expressly ceded to the states the right to regulate the aspect of nuclear safety otherwise fully regulated by Section 210. Neither petitioner nor the United States is able to point to anything in the language or the legislative history of Section 210, the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended, that refers in any way to the right of states to regulate the aspect of nuclear safety addressed by Section 210.<sup>23</sup>

<sup>22</sup>Specifically, the Court looked to the legislative history of the Price-Anderson Act of 1957, Pub. L. No. 85-256, 71 Stat. 576 (which amended the Atomic Energy Act), and to subsequent amendments of Price-Anderson. 464 U.S. at 251-55.

<sup>23</sup>Petitioner does suggest that in Section 274(k) of the Atomic Energy Act, as amended, 42 U.S.C. § 2021(k), Congress granted states authority "to regulate activities connected with atomic energy." See Pet. Br. 21-22. Subsection (k) provides petitioner no support, however, for two reasons. First, this Court squarely foreclosed an expansive reading of subsection (k) in *Pacific Gas & Electric*: It held that subsection (k) "does not represent an affirmative grant of power to the States." 461 U.S. at 210. The Court explained that subsection (k) simply "underscored the distinction drawn in 1954 between the spheres of activity left respectively

The critical facts on which the Court based its decision not to preempt the state laws in *Pacific Gas & Electric* and in *Silkwood* are therefore absent here. Unlike *Pacific Gas & Electric*, the state law at issue here does *not* operate in the field of economic concerns expressly ceded by Congress to the states. Unlike *Silkwood*, there is no legislative history of any kind from which to draw an inference of congressional intent not to preempt these state law remedies. More striking still, unlike in *Silkwood*, Congress here has enacted a comprehensive remedial and enforcement scheme, providing not only reinstatement and back pay, but also full compensatory relief, costs, and attorney's fees for those who suffer injuries of the sort alleged here. *E.g.*, *DeFord v. Secretary of Labor*, 700 F.2d 281, 288-89 (6th Cir. 1983). Under this Court's established field preemption doctrine, as applied in both *Pacific Gas & Electric* and in *Silkwood*, there is no basis for exempting petitioner's claim from preemption.

**D. State Law That Infringes On A Field Reserved Exclusively For Federal Control Is Preempted Regardless Of Its Purpose.**

Because they have no evidence that Congress intended to allow the States to regulate the "whistleblower" aspect of nuclear operations and safety, petitioner and the United States have resorted to the argument that state law may invade a field exclusively reserved to the federal government so long as the state's *purpose* in passing its law is different from the purpose behind the federal law. See Pet. Br. 10; S.G. Br. 7, 12-14. That argument

to the Federal Government and the States." *Id.* Second, as the Court also explained in *Pacific Gas & Electric*, subsection (k) by its plain terms "limits only the pre-emptive effect of 'this section,' that is, § 274 [governing federal-state agreements]." *Id.* It therefore does not serve to limit the preemptive scope of other sections, such as Section 53, 42 U.S.C. § 2073 (under which respondent's facility is licensed) or Section 210 of the ERA. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987).

fundamentally distorts the doctrine of field preemption as this Court has consistently applied it.<sup>24</sup>

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), this Court addressed a federal statutory scheme giving "exclusive" authority to the Secretary of Agriculture to license and regulate warehouses. 331 U.S. at 233. In light of this exclusive authority, the Court established the following test for determining questions of preemption:

The test, therefore, is whether *the matter on which the State asserts the right to act is in any way regulated by the Federal Act*. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.

*Id.* at 236 (emphasis added). *Rice* squarely forecloses the Solicitor General's theory of preemption, because what matters according to *Rice* is not the purpose for the state's action but "the matter on which the State asserts the right to act." *Id.* As *Rice* makes plain, once a court finds that this matter is one that is "in any way regulated by the Federal Act," the state law is preempted. *Id.* In subsequent decisions, this Court has

<sup>24</sup> *Amici NCSL, et al.*, are more open in their attempt to undo the doctrine of field preemption. They argue (Br. 15-16) that in *Silkwood* this Court abandoned field preemption in the nuclear field and held that "preemption analysis in matters nuclear would henceforth focus on whether 'there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law'" (quoting *Silkwood*, 464 U.S. at 256). But in the very passage in *Silkwood* on which NCSL relies, the Court explains that conflict preemption is relevant *only* "insofar as damages for radiation injuries are concerned" because Congress had expressly indicated that its preemption of the field of nuclear safety did not extend to state tort law remedies for such injuries. *Id.* Apart from this misreading of *Silkwood*, neither the NCSL nor the Solicitor General explains why the Court should overrule decades of settled preemption law or substitute "conflict" preemption standards for field preemption standards in an area of unquestioned federal supremacy.



squarely rejected the "suggest[ion] that . . . [preemption] should depend upon whether the purposes of the two laws are parallel or divergent." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (emphasis in original); see, e.g., *id.* ("The test of whether both federal and state regulations may operate . . . is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives"); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618-19 (1986) (although city's purpose is "simply" to exercise "a traditional municipal function," its action is preempted because it "intrudes into the collective bargaining process"); *Perez v. Campbell*, 402 U.S. 637, 652 (1971) ("such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law").<sup>25</sup> Compare Br. for United States at 26-27, *Pacific Gas & Electric v. State Energy Resources Conservation and Dev. Comm'n*, No. 81-1945 (1983) ("This Court has long recognized the irrelevance of legislative motives to questions of preemption").

In *Pacific Gas & Electric*, the Court held the preemption rule announced in *Rice* fully applicable to the field of nuclear safety:

<sup>25</sup> For example, under the Solicitor General's view, a state law prohibiting cable television operators from broadcasting commercials for alcoholic beverages would no longer be subject to field preemption, despite its invasion of the federal government's exclusive authority over cable communications, because the state law "also effectuates a public policy [reducing alcohol abuse] distinct from [the agency's purpose of regulating signal carriage]." S.G. Br. 14 n.8. But that result is flatly inconsistent with this Court's decision in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 704-05 (1984) (state law prohibiting alcoholic beverage commercials "trespasses into the exclusive domain of the FCC" and is preempted).

When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 236.

461 U.S. at 212-13. The application of this test here is straightforward. The "matter on which the state asserts the right to act" is the emotional distress allegedly suffered by an employee at a nuclear facility because her employer allegedly retaliated against her for raising safety concerns about the plant. This is a matter that is directly regulated by federal law as part of a comprehensive scheme of nuclear licensing exclusively reserved by Congress to the NRC. Under the test established in *Rice* and reaffirmed in *Pacific Gas & Electric*, petitioner's claim is preempted because Congress has deliberately and carefully occupied this field.

The Solicitor General's suggestion (S.G. Br. 12-13) that this Court somehow altered this basic preemption principle by examining the purpose behind the California statute in *Pacific Gas & Electric* is flatly wrong. Although the Court examined the state's legislative purpose, it did so solely to determine whether the regulation fell within the limited area that Congress explicitly carved out of the otherwise preempted field.<sup>26</sup> Not only did the Court in *Pacific Gas & Electric* explicitly reaffirm the reasoning in *Rice* (461 U.S. at 212-13), it expressly stated that the state legislature's purpose was irrelevant to the question of field preemption:

<sup>26</sup> The Court explained that an inquiry into legislative purpose was essential in order to determine how that law should be "construed and classified." *Pacific Gas & Electric*, 461 U.S. at 212-13. As the Court explained, "[a] state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field," while a moratorium "aimed at economic problems," the resolution of which Congress had expressly ceded to the States, does not. *Id.* at 213.



At the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, *even if enacted out of nonsafety concerns*, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation.

461 U.S. at 212 (emphasis added). That holding lays to rest petitioner's and her *amici's* heavy reliance upon the purpose of state law as a legitimate basis for avoiding preemption in this case.

## II. PETITIONER'S STATE LAW CLAIM IS PRE-EMPTED BECAUSE IT STANDS AS AN OBSTACLE TO THE FULL ACHIEVEMENT OF CONGRESS'S OBJECTIVES IN REGULATING THE SAFETY AND OPERATIONS OF NUCLEAR FACILITIES.

As discussed above, when Congress has reserved a particular field to the exclusive control of the federal government, state regulation that trespasses on that field is preempted regardless of whether it conflicts with or even complements federal law. Petitioner's claim, however, also "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. at 67. This frustration of congressional purpose establishes an independent basis for preemption under this Court's conflict-preemption principles. *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

In analyzing conflict preemption, Section 210 should not be viewed as "merely a single statutory provision granting a remedy to employees in one industry for one type of discrimination by employers." S.G. Br. 17. Section 210 is "a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), quoting *Northwest Airlines, Inc. v.*

*Transport Workers, Inc.*, 451 U.S. 77, 97 (1981). In examining such schemes, the Court has observed that the remedies Congress has chosen to provide and to omit must be presumed to reflect important policy choices, and has preempted state law that would upset the "careful balancing" that these choices reflect. *Pilot Life Ins. Co. v. DeDeaux*, 481 U.S. 41, 54 (1987).<sup>27</sup> Furthermore, Section 210 must be analyzed not in isolation, or against employee protection provisions in other statutes,<sup>28</sup> but against the background and purposes of the ERA and the Atomic Energy Act. *International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (for preemption purposes, statutory provision must be analyzed in the context of the statute "as a whole, its purposes and its history").

### A. Congress's Objective In Enacting Section 210 Was To Create A Balanced Scheme That Would Further The Goal of Ensuring The Safe Operation Of Nuclear Facilities.

Section 210 is not concerned with the ordinary terms of employment in the nuclear industry, but with a distinct aspect of the employment relationship: protecting employees against job-related retaliation based on their report of possible safety hazards. As we have discussed, the structure, legislative history and regulations implementing Section 210 all reveal the basic point that the

<sup>27</sup> See, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 109 S.Ct. 971, 975 (1989); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588 (1979).

<sup>28</sup> Employee protection provisions in other statutes are of little relevance here. First, those statutes, which typically adopt a joint federal/state approach to regulation, differ fundamentally from the Atomic Energy Act. *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 16 (1976). Second, the provisions themselves vary significantly across statutes. For example, two such provisions allow employees to obtain punitive damages, see note 15, *supra*, while one does not even provide compensatory relief. 29 U.S.C. § 160(c). Each provision therefore reflects Congress's attempt "to tailor [employee protection] to the needs of th[e] bill." 120 Cong. Rec. 36,393 (1974) (statement of Rep. Heinz).

employee protection provided by Section 210 is an important means to the fundamental goal of ensuring the safe operation of nuclear facilities.

Allowing state tort claims for injuries that are compensable under Section 210 would frustrate two important safety-related purposes of Section 210. First, allowing such claims would significantly delay or eliminate notification to the NRC that an allegation of retaliation has been made, an incident that is itself a serious safety concern. Second, allowing such claims would undermine Congress's goal of ensuring that employers are not unduly deterred from taking responsible disciplinary action. Thus, the courts below correctly held that petitioner's claim directly impeded the purposes of Section 210 as reflected in the various elements of this remedial scheme.

**B. Failure To Preempt State Law Claims For Injuries Arising Out Of Conduct Regulated By Section 210 Would Preclude This Statute From Fully Achieving Its Purpose**

1. Allowing employees to bring state tort claims based on the same conduct governed by Section 210 would seriously impair the ability of the NRC to fulfill its statutory mandate to ensure nuclear workplace safety. *E.g.*, 47 Fed. Reg. 30,452 (1982). While Section 210 requires employees to file their claims of workplace discrimination within 30 days, and requires the Secretary to investigate such claims promptly, state tort claims have statutes of limitations measured in years rather than days; an employee therefore could delay for years before bringing her claim. Moreover, even if the claim is brought in court relatively quickly, such a filing does not trigger any notice to the NRC.

Petitioner argues that as a practical matter the NRC will always receive notice because the premise for the retaliation will necessarily be a complaint to the NRC. But this argument is flawed in two fundamental respects. First, Section 210 repeatedly has been held to preclude retaliation not only for complaints made to the

NRC, but also for threats to complain to the NRC and for complaints voiced solely to the employer.<sup>29</sup> Second, and more fundamentally, the NRC views an act of retaliation itself as a safety violation of significant concern—potentially serious enough to warrant revocation of a license. 10 C.F.R. § 70. (c); see page 20, *supra*. State law remedies that allow employees to bypass the statutorily provided complaint procedures and therefore fail to notify the Secretary (who in turn notifies the NRC) of retaliatory employment action seriously impede a central purpose of the statute.<sup>30</sup>

2. Allowing state law claims such as petitioner's to go forward also would deter employers from taking appropriate disciplinary action by creating considerable uncertainty and inconsistency in the treatment of employ-

<sup>29</sup> All appellate courts (but one) that have reached the issue have held that Section 210 applies to retaliation for safety complaints voiced only to the employer. See, *e.g.*, *Mackowiak v. University Nuclear Sys., Inc.*, 730 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1511-13 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Consolidated Edison Co. of N.Y., Inc. v. Donovan*, 673 F.2d 61 (2d Cir. 1982). But see *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1031 (5th Cir. 1984). The Secretary has consistently ruled that internal complaints constitute protected activity, *Lopez v. West Texas Util.*, 86-ERA-25 (July 26, 1988) (citing *Francis v. Bogan*, 86-ERA-8 (April 1, 1988)), and has expressly rejected *Brown & Root*, *Nunn v. Duke Power Co.*, 84-ERA-27 (July 30, 1987).

<sup>30</sup> The Department of Labor recently recognized the potential for conflict between a state tort remedy and Section 210. During hearings on H.R. 3368, an omnibus whistleblower protection bill currently pending in Congress, the Solicitor of Labor testified that "in order to preclude duplicative State law proceedings," the bill "should preempt State whistleblower claims premised on State wrongful discharge statutes and common law." *Whistleblower Protection Act: Hearing on H.R. 3368 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 101st Cong., 1st Sess. 69 (1989). The Administration later explained that a federal remedial scheme should preempt state law claims because otherwise "the federal agency with substantive health and safety responsibilities" would not be notified and an important goal of [the federal law] would be frustrated." *Id.* at 246.



ment discrimination claims. Subsection (g), which precludes recovery for an employee who "deliberately causes a violation of any requirement of [the Energy Reorganization] Act or of the Atomic Energy Act" (42 U.S.C. § 5851(g)), reflects Congress's concern not to deter employers from taking appropriate disciplinary action where necessary to protect workplace safety. As the district court found, state tort law contains no analogue to subsection (g).

The Solicitor General suggests that the subsection (g) exemption could be treated by juries as a federal defense. S.G. Br. 21. Such an approach does not avoid the conflict problems, but compounds them. Treating subsection (g) as a "defense" for the jury merely to weigh against plaintiff's claims would still conflict with Congress's intent, because subsection (g) *excludes* from coverage employees who deliberately cause nuclear violations; treating subsection (g) as an absolute bar to relief under state law, however, merely begs the question why, if subsection (g) effectively preempts state law, the balance of Section 210 does not do so as well. Moreover, the Solicitor General's disagreement with the courts below over the scope and meaning of subsection (g) demonstrates how employers will be subjected to conflicting determinations of liability even if subsection (g) is transformed into a federal defense.<sup>31</sup>

<sup>31</sup> The Solicitor General's interpretation that subsection (g) bars relief only for employees who "have 'blown the whistle' on the very safety violation that they have caused" (S.G. Br. 22 n.14) is unduly narrow. It authorizes the Secretary of Labor to *reinstate* (and provide compensatory relief to) employees who have *deliberately caused* numerous violations of the Atomic Energy Act, so long as they have reported other safety violations to the NRC. Surely Congress intended to foreclose such a dangerous result when it added subsection (g).

Moreover, as a practical matter the Solicitor General's interpretation would significantly deter licensed employers from taking appropriate disciplinary action. Because alerting their supervisors or the NRC to actual or potential safety violations is one of the basic responsibilities of all employees in a nuclear facility, vir-

This legal inconsistency will be further compounded by the confusion that will arise as juries are asked to evaluate the facts related to a subsection (g) issue. To determine whether an employer acted retributively or responsibly in changing an employee's terms of employment, juries will be required to resolve technically difficult factual questions involving the meaning and significance of various provisions of the Atomic Energy Act, the ERA, and the Commission's long and complex set of regulations. In this case, for example, any judgment whether the Company acted responsibly or reprehensibly necessarily involves a determination whether petitioner's intentional failure to clean up contaminated matter violated "any requirement" of the ERA or Atomic Energy Act, and whether and to what degree petitioner's willingness to violate safety rules (as she concededly did) in order to dramatize her safety concerns itself posed a threat to the health and safety of other employees. Unlike the Secretary of Labor, however, juries addressing these issues will not be able to draw upon the "full cooperation" of the NRC or on prior experience in the field.

Furthermore, claims for intentional infliction of emotional distress arising out of allegedly retaliatory employment actions necessarily require an evaluation whether the employer's conduct was "outrageous," but the standards for determining what is "outrageous" vary widely from state to state. *Atchison, T. & S. F. Ry. v. Buell*, 480 U.S. 557, 568-70 (1987); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988). And no matter what standard applies in a given state, in order to determine whether an employer acted "outrageously" in retaliating against a whistleblower, the jury will necessarily have to

usually any employee could claim that disciplinary action was in response to an "unrelated" safety complaint to someone. Nothing in the language of subsection 210(g) requires this odd construction; indeed, Congress's express purpose for including subsection (g) was "to avoid abuse of the protection afforded in this section." S. Rep. No. 848 at 30.



evaluate whether the employer had valid reasons, including reasonable safety-based concerns, to support the employment-related responses it made. Thus, even apart from subsection (g), the possibility that the jury's evaluation of the employer's and employee's competing safety interests will differ from that of the Secretary of Labor and the NRC is obviously real, and the consequent uncertainty over the scope of liability will inevitably deter employers from taking appropriate disciplinary action. Because such deterrence will upset the careful balance that Congress created in Section 210, such state law claims should be preempted.

**C. Allowing Employees to Seek Punitive Damages Conflicts Fundamentally With Congress's Intent.**

By allowing employees to seek a remedy—punitive damages—that Congress deliberately withheld from them under Section 210, state law claims such as petitioner's both exacerbate the likelihood that employees will bypass Section 210 review altogether and further deter employers from taking the responsible disciplinary action that Congress intended. This clear conflict with Congress's purposes requires preemption of petitioner's claim.

There is no doubt that Congress's decision not to allow employees to obtain punitive damages was deliberate. "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (citation omitted). Congress knows how to make punitive damages available to employees when it wants to, because the whistleblower provisions in two other statutes expressly grant employees authorization to obtain them. See note 15, *supra*. Here, moreover, Congress did not overlook the question of punitive damages; it expressly reserved to the Secretary the discretion to determine when to seek them, and even then only for the separate act of deliberately ignoring the Secre-

tary's remedial order. 42 U.S.C. §§ 5851(b)(2)(B), 5851(d). Replacing the Secretary's carefully bounded discretion with the unlimited private interest of an employee and her attorney flatly conflicts with Congress's intent.

In addition, this Court has previously recognized the powerful impact that the availability of punitive damages may have on the balance of incentives inherent in a statutory scheme. In *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979), for example, this Court refused to allow a discharged railroad employee to recover punitive damages for a union's breach of the duty of fair representation. The Court held that punitive damages "could undermine [the] careful accommodation" of interests reflected in the statute (*id.* at 50), and in particular that unions "could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members." *Id.* at 52.

Similarly, to allow employees in the nuclear industry to seek enormous punitive damage awards (such as the \$2.3 billion sought here) under shifting state standards would significantly deter employers from taking any action to change the terms, conditions or privileges of a particular employee's job. Such a powerful deterrent would perhaps be consistent with the interest in avoiding retaliation and might be justified if there were no trade-offs, that is, if no employee ever violated safety requirements or otherwise presented a risk to the safe operation of a nuclear facility. Nonetheless, certain employees do pose this risk in the workplace, as Congress's decision to include subsection (g) reveals. Decisions of the Secretary under Section 210 and of courts in analogous contexts confirm that it is vitally important to allow nuclear industry employers some room to act in dealing with employees who are perceived as irresponsible.<sup>32</sup> If the em-

<sup>32</sup> See note 16, *supra*; see also *Iowa Elec. Light & Power Co. v. Local Union 204*, 834 F.2d 1424, 1429 (8th Cir. 1987) (employee who violated federal safety rule "is no longer to be trusted to work

ployer in fact acts in retaliation for safety complaints, Section 210 provides a remedy. But the decision to preclude a punitive damages claim reflects Congress's view of the importance of constructing a careful balance between competing safety interests.

Finally, permitting state courts to award enormous punitive damages will directly undermine Congress's avowed goal to have employees bring Section 210 claims promptly to the Secretary's attention. See pages 21-22, 38-39, *supra*. It is difficult to believe that very many employees will choose Section 210 as the preferred remedy if they may pursue multi-million dollar awards in state court.<sup>33</sup> Indeed, the NRC is unlikely to learn of the most serious complaints, because these complainants will have the most incentive to seek a windfall punitive damages award under state law. The two *amici* briefs filed on behalf of petitioner by "plaintiffs' trial lawyers" are vivid testimony to a crucial fact of life: Few plaintiffs' lawyers are likely to recommend that their clients seek redress from the Secretary of Labor when a pot of gold—claimed in this case to be \$2.3 billion—may lie at the end of the state court rainbow. In sum, to allow employees to seek punitive damages in court before a jury would create a powerful incentive to avoid administrative review altogether, thereby (1) frustrating Congress's goal of ensuring prompt investigation of retaliation complaints, (2) overriding the Secretary's carefully circumscribed discretion when to seek punitive damages, and

in such a critical [nuclear power] environment . . . [because he] will jeopardize the safety of the public"; *Ashcraft v. University of Cincinnati*, 83-ERA-7 (Secretary's Decision, Nov. 1, 1984) (Section 210 complaint dismissed because employee suspended for mishandling radioactive materials).

<sup>33</sup> Although employees would not be barred jurisdictionally from filing a Section 210 claim as well as a state court suit, they would have no incentive to do so and good reason not to. An adverse decision from the Secretary would lead to dismissal of the state court action by collateral estoppel, see *University of Tennessee v. Elliot*, 478 U.S. 788, 797-98 (1986), and any damages the Secretary might award would likely be subtracted from a subsequent jury award.

(3) deterring nuclear employers from taking appropriate disciplinary action.

### III. BY ANALOGY TO LABOR PREEMPTION DOCTRINES, SECTION 210 PREEMPTS A CLAIM FOR EMOTIONAL DISTRESS ARISING OUT OF ALLEGED EMPLOYMENT DISCRIMINATION IN RETALIATION FOR REPORTING NUCLEAR SAFETY COMPLAINTS.

Petitioner suggests that Section 210 is appropriately analyzed as a labor relations provision that governs certain aspects of the employer-employee relationship. Pet. Br. at 26-31; but see S.G. Br. at 19 n.12. Although in our view Section 210 is inextricably a part of the field of nuclear safety regulation, the analogy to labor law simply underscores the case for preemption, and provides an independent basis for affirming the judgments below.

This Court has long recognized the "comprehensive regulation of industrial relations by Congress." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239 (1959). Because Congress "entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (*id.* at 242), the reasons underlying preemption have their "greatest force" when states attempt to regulate labor relations. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 193 (1978). Section 210 thus lies at the intersection of two predominant, traditional federal interests, each of which alone has been held sufficient to preempt state law. *Cf. Boyle v. United Technologies Corp.*, 108 S.Ct. 2510, 2514-2516 & n.4 (1988) (combination of two uniquely federal interests weighs in favor of preempting liability under state law).

Federal labor law and its preemption doctrines are particularly significant in two respects. First, as recognized by petitioner, to the extent that Section 210 may be fairly characterized as regulating the employment relationship, its nearest analogy lies in Section 8 of the National Labor



Relations Act ("NLRA").<sup>34</sup> Like Section 210, the NLRA prohibits certain discrimination by the employer in retaliation for protected employee conduct. The point at which Section 210 and the NLRA diverge—remedies (limited under the NLRA to back pay and reinstatement)—simply reinforces the conclusion that Section 210 preempts petitioner's cause of action. Second, federal labor policy reflects congressional intent to use an administrative scheme "to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286 (1971) (footnote omitted); see also *Belknap, Inc. v. Hale*, 463 U.S. 491, 511 (1983). Similarly, Congress used Section 210 to create an administrative scheme that calibrates at the national level the benefits and risks of affording employee protection to assure the optimum protection of health and safety in the nuclear workplace and of the public generally.

**A. Under Labor Preemption Principles, Petitioner's Claim Is Preempted Because It Arises Out Of Conduct Addressed By Section 210.**

In holding that Section 210 preempts petitioner's claim for emotional distress arising from changes in the terms and conditions of her employment, the district court correctly applied the labor preemption analysis enunciated in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977). The plaintiff in *Farmer* alleged that union officials "had intentionally engaged in outrageous con-

<sup>34</sup> Congress indicated that Section 8(a)(4) was one of the provisions on which Section 210 was patterned. S. Rep. No. 848, 95th Cong., 2d Sess. 29, reprinted in 1979 U.S. Code Cong. & Admin. News 7303, 7303. Section 8(a)(4) provides that it is an unfair labor practice for an employer or union "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act]." 29 U.S.C. § 158(a)(4). The National Labor Relations Board has exclusive jurisdiction to hear complaints concerning unfair labor practices. 29 U.S.C. § 160; see *Belknap, Inc. v. Hale*, 463 U.S. 491, 508-509 (1983).

duct, threats, and intimidation, and had thereby caused him to suffer grievous emotional distress resulting in bodily injury." *Id.* at 293. The particular acts constituting "outrageous conduct" were discrimination in referrals to employers and "a campaign of personal abuse and harassment." *Id.* at 292 & n.2.

This Court held that while some state tort claims for intentional infliction of emotional distress would not be preempted by federal law, "[u]nion discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based." *Id.* at 305. The Court explained that to avoid preemption:

it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

*Id.* (footnote omitted). A remand was therefore necessary because the "focus of the trial was on employment discrimination rather than the intentional infliction of emotional distress." *Id.* at 306 n.14.

Under *Farmer*, petitioner's claim is preempted because petitioner does not allege tortious conduct beyond the job-related retaliation addressed by Section 210. Instead, she complains solely about emotional distress caused by the circumstances surrounding the changes in the terms and conditions of her employment following her safety reports. As already discussed, the district court here correctly recognized the difference stressed in *Farmer* between tort claims that arise out of conduct subject to exclusive federal regulation and tort claims that arise out of conduct not subject to federal regulation. Pet. App. 28a. When petitioner's complaint is stripped of the impermissible, preempted claims, it fails to state a cause of action for intentional infliction of emotional distress under state law. Because both courts below agreed on that issue of North Carolina law, this



Court should defer to that judgment. See *supra*, page 28 and note 19.<sup>35</sup>

**B. Labor Preemption Principles Require Preemption Where, As Here, There Is An Imminent Possibility That State Law Remedies Will Conflict With Federal Law.**

Allowing a state to regulate the conduct alleged in this case would not merely provide an additional unintended remedy to employees but also would seriously clash with Congress's carefully tailored administrative scheme and evoke the very conflicts that the preemption principles governing employment relations are designed to prevent. First, this Court has recognized that "'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity.'" *Wisconsin Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (quoting *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 498-499 (1953)); see *Garmon*, 359 U.S. at 247. Second, the coexistence of various state court procedures with a federal administrative scheme inevitably creates a direct conflict with Congress's purposes, because "[c]onflict in technique can be fully as disruptive . . . as

<sup>35</sup> Petitioner's reliance upon *Automobile Workers v. Russell*, 356 U.S. 634 (1958) and *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) is similarly misplaced. In these cases, state law was not preempted because "[n]othing in the federal labor statutes protects or immunizes from state action violence or the threat of violence. . . ." *Farmer*, 430 U.S. at 299. But petitioner's claim is not of that kind; it arises solely out of changes in the customary terms of employment and is—as the Labor Department ALJ already ruled—squarely covered by timely complaint under Section 210.

Petitioner's reference to *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S.Ct. 1877, 1880 (1988), is inapposite. *Lingle* involves Section 301(a) of the Labor Management Relations Act, which preempts state-law claims "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement." *Id.* at 1881. Although any analogy to Section 301 seems strained, the fact that petitioner's state law claim "would depend on the meaning of" federal statutes and regulations argues once again for preemption.

conflict in overt policy." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286 (1971); *Gould*, 475 U.S. at 286, 288 n.5. These concerns about substantial conflicts apply with equal force to Section 210. See Part II, *supra*.

Even if petitioner's claim were entirely consistent with the purposes of Section 210, moreover, the fact remains that a "simple congruity of legal rules does not, in [the labor relations] area, prove the absence of untenable conflict." *Lockridge*, 403 U.S. at 290. For instance, this Court in *Gould* struck down a state law barring firms who have violated the NLRA from conducting business in the state because such a remedy "would interfere with Congress' 'integrated scheme of regulation' by adding a remedy to those prescribed by the NLRA." 475 U.S. at 287 (quoting *Garmon*, 359 U.S. at 247) (emphasis added). It made no difference in *Gould* that the "supplemental" state remedy was "different in kind from those that may be ordered by the [NLRB]." *Id.* (quoting *Garmon*, 359 U.S. at 243); see *Lockridge*, 403 U.S. at 292. The proper focus is not whether the state remedy would be available under federal law, but rather on the nature of the regulated activities. *Gould*, 475 U.S. at 287. "[T]o allow the State to grant a remedy . . . which has been withheld from the [NLRB] only accentuates the danger of conflict," *Garmon*, 359 U.S. at 247, "because 'the range and nature of those remedies that are and are not available is a fundamental part' of the comprehensive system established by Congress." *Gould*, 475 U.S. at 287 (quoting *Lockridge*, 403 U.S. at 287)). Thus, the analogy to labor law underscores the conclusion that Section 210 preempts petitioner's claim.

\* \* \*

At bottom, this case calls on the Court to reconcile the competing interests of the federal and state governments in an area of extreme sensitivity—nuclear safety. Unlike petitioner, the Company is not asking the Court to accord preeminence to either set of interests. We

recognize that the State of North Carolina has a substantial interest in ensuring that victims of extreme and outrageous conduct are compensated for their emotional injuries. But there is nothing in the exclusivity of Section 210 that undermines the State's interest. For employer conduct prohibited by Section 210, the Secretary of Labor will provide compensation that serves the State's interest. For conduct beyond the bounds of Section 210, the State remains free to provide whatever remedies the State deems appropriate.

On the other side of the ledger, allowing Section 210 to operate free of state law interference will protect the overriding federal interest in promoting nuclear safety. Section 210's role in this regard is critical because the NRC properly regards employer retaliation itself a serious nuclear safety hazard. Thus, the Court simply cannot allow the incentives created by this state tort claim to interfere with Section 210 and still be faithful to Congress's intent to retain exclusive federal control over safety in the operation of nuclear facilities.

### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

BENJAMIN W. HEINEMAN, JR.  
 PHILIP A. LACOVARA  
 BARTON A. SMITH  
 GENERAL ELECTRIC COMPANY  
 3135 Easton Turnpike  
 Fairfield, CT 06431  
 (203) 373-2492

REX E. LEE  
 CARTER G. PHILLIPS \*  
 MARK E. HADDAD  
 NANCY A. TEMPLE  
 SIDLEY & AUSTIN  
 1722 Eye Street, N.W.  
 Washington, D.C. 20006  
 (202) 429-4000

*Counsel for Respondent*

April 12, 1990

\* Counsel of Record

10  
No. 89-152

Supreme Court, U.S.

FILED

APR 18 1989

JOSEPH F. SPANIOLO  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

VERA M. ENGLISH,  
*Petitioner,*  
v.

GENERAL ELECTRIC COMPANY,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER  
VERA M. ENGLISH

M. TRAVIS PAYNE \*  
EDELSTEIN, PAYNE & NELSON  
P.O. Box 12607  
Raleigh, NC 27605  
(919) 828-1456

ARTHUR M. SCHILLER  
Attorney at Law  
Suite 430  
1920 N Street, N.W.  
Washington, DC 20036  
(202) 857-5658

*\*Counsel of Record for Petitioner*



## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
I. THE ANTECEDANTS TO SECTION 210 SHOW THAT IT IS NOT A NUCLEAR SAFETY STATUTE .....	1
II. THE LOWER COURTS ADDRESSED THE RULING IN <i>FARMER</i> IN A FEDERAL, AND NOT A STATE CONTEXT .....	6
III. FEDERAL REMEDIES ARE PRESUMED TO SUPPLEMENT RATHER THAN SUPPLANT STATE-CREATED RIGHTS .....	7
CONCLUSION .....	9

## TABLE OF AUTHORITIES

CASES	Page
<i>Adams Fruit Company, Inc. v. Ramsford Barrett</i> , 58 U.S.L.W. 4367 (1990) .....	7
<i>Billings v. Tennessee Valley Authority</i> , 87-ERA- 5 (Order of March 28, 1988) .....	8
<i>Bohan v. Tennessee Valley Authority</i> , 87-ERA-28 (Order of October 30, 1987) .....	8
<i>Teamsters Local No. 391 v. Terry</i> , 58 U.S.L.W. 4345 (1990) .....	8
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977) .....	6
<i>Fort Halifax Packing Co. v. Coyne</i> , 482 U.S. —, 96 L.Ed. 2d 1, 17 (1987) .....	8
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. —, 109 S.Ct. 2782 (1989) .....	8
<i>Lytle v. Household Manuf. Inc.</i> , 58 U.S.L.W. 4341 (1990) .....	8
<i>McCustion v. Tennessee Valley Authority</i> , 89- ERA-006 (Order of February 28, 1989) .....	8
<i>Pacific Gas &amp; Electric v. State Energy Resources Conservation and Development Commission</i> , 461 U.S. 190 (1983) .....	2
<i>United States v. Allis-Chalmers Corp.</i> , 498 F.Supp. 1027 (E.D.Wis. 1980) .....	8

## STATUTES

Section 210, Energy Reorganization Act, 42 U.S.C. 5851 .....	<i>passim</i>
Clean Air Act, 42 U.S.C.	
7622 .....	3, 4
7622(b) (1) .....	4
7622(b) (2) (A) .....	4
7622(d) .....	4, 5
7622(g) .....	5
Federal Water Pollution Control Act, 33 U.S.C.	
1367 .....	3, 4
1367(b) .....	4
1367(d) .....	4

## TABLE OF AUTHORITIES—Continued

Mine, Health and Safety Act of 1969, 30 U.S.C.	Page
815(c) .....	4
815(c) (2) .....	4
815(c) (3) .....	4
Safe Drinking Water Act, 42 U.S.C.	
300j-9 .....	4
300j-9(i) (2) (A) .....	4
300j-9(i) (2) (B) .....	4
300j-9(i) (6) .....	5
Toxic Substances Control Act, 15 U.S.C.	
2622 .....	4
2622(b) (1) .....	4
2622(b) (2) .....	4
2622(e) .....	5
Solid Waste Disposal Act, 42 U.S.C.	
6971 .....	4
6971(b) .....	4
6971(d) .....	5
Surface Mining Act, 30 U.S.C.	
1293 .....	4
1293(b) .....	4

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

---

No. 89-152

---

VERA M. ENGLISH,  
*Petitioner,*

v.

GENERAL ELECTRIC COMPANY,  
*Respondent.*

---

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

---

REPLY BRIEF OF PETITIONER  
VERA M. ENGLISH

---

ARGUMENT

I. THE ANTECEDANTS TO SECTION 210 SHOW  
THAT IT IS NOT A NUCLEAR SAFETY STATUTE

The fundamental premise of Respondent's argument is that Section 210 is inextricably and specifically tied in to "the comprehensive federal regulatory scheme to protect nuclear health and safety." (Respondent's Brief, p. 8). In contrast, the lower courts concluded that the statute was primarily one involving employment relations and that "... employee protection was the paramount congressional intent." (Pet. App. 19a) The lower courts



were thus "... unconvinced ... that Congress intended Section 210 to be a regulator of nuclear safety and therefore preemptive under *Pacific Gas & Electric [v. State Energy Resources Conservation and Development Commission]*, 461 U.S. 190 (1983)]" (Pet. App. 18a) On this pivotal point Respondent states that "the district court simply erred. . . ." (Respondent's Brief, p. 26)

To support its "nuclear safety" argument, Respondent relies on the "structure" of Section 210, referring to its short time frames of 30 days for filing claims and 90 days for the Secretary of Labor to issue a decision (See Respondent's Brief pp. 8, 9-10, 17, 21-22), the exclusionary provision of Section 210(g) for employees who deliberately engage in violations of the Atomic Energy Act (Respondent's Brief pp. 8, 10, 22, 23), and the provision in Section 210 (d) authorizing the Secretary to seek exemplary damages only in a suit commenced to enforce the Secretary's order. (Respondent's Brief pp. 18, 23) Respondent suggests from this "structure" that Section 210 is a carefully reasoned act of Congress specially tailored to the concerns of nuclear safety:

Moreover, the structure of Section 210 confirms what the legislative history makes plain, which is that Congress viewed employee protection in the nuclear context not simply as an end in itself, but as a *means* to the ultimate end of enhancing nuclear safety. For example, if employee protection were the only significant purpose for Section 210, then the requirement that any complaint be brought within 30 days of the alleged violation would seem unnecessarily strict. But this short time-requirement makes perfect sense given the broader recognition, explicit in the NRC regulations, that the fact of employer retaliation is itself a serious safety concern.

(Respondent's Brief pp. 21-22) (emphasis in original). And, with respect to the "structural import" of the exclusionary provision which Respondent says was "so

carefully built into subsection [210] (g)," (*Id.* p. 23) Respondent states:

The inclusion of subsection (g) alone establishes that Congress intended Section 210 to operate as an *integral part of the system of exclusive control over nuclear safe'y.*

(*Id.* p. 23) (emphasis added).<sup>1</sup>

In fact, none of the provisions in Section 210 relied on by Respondent have anything to do with nuclear safety. Rather, as the title of Section 210 makes plain, "Employee Protection" was the focus of Congress' concern, and the provisions embodied in Section 210 were adopted wholesale from the "employee protection" provisions of other "whistleblower" acts previously adopted by Congress.

First of all, Section 210 was neither included in the Atomic Energy Act when originally enacted in 1954, nor was it part of the re-structuring which accompanied passage of the Energy Reorganization Act of 1974. Rather, Section 210 was adopted as part of the Nuclear Regulatory Commission authorization bill for fiscal year 1979, P.L. 95-601, November 6, 1978.

Secondly, as set forth in the legislative history, Section 210 was patterned after employee-protection provisions in the Federal Water Pollution Control Act, 33 U.S.C. Section 1367, and the Clean Air Act, 42 U.S.C. Section 7622, as well as "... a similar provision in Public Law 91-173 relating to the health and safety of the Nation's coal miners." Senate Report 95-848, 95th Cong., 2d Sess., at p. 29.<sup>2</sup> In spite of the fact that none of these acts

<sup>1</sup> Respondent thus concludes that a state tort action "stands as an obstacle to the full achievement of Congress's objectives in *regulating the safety and operations of nuclear facilities.*" (emphasis added) (See Respondent's Brief pp. 38, 40-41, 42).

<sup>2</sup> The employee protection acts adopted by Congress prior to enacting Section 210 are as follows: Coal Mine Safety and Health

involve nuclear safety, two of them have provisions requiring that an administrative charge be filed within 30 days of the discrimination [33 U.S.C. 1367(b); and 42 U.S.C. 7622(b)(1)], and one of them requires the charge to be filed within 60 days. 30 U.S.C. 815(c)(2).<sup>3</sup> In addition, the Clean Air Act also has a provision requiring a decision by the Secretary within 90 days. 42 U.S.C. 7622(b)(2)(A).<sup>4</sup>

Similarly, just as Section 210(g) excludes persons who deliberately violate the requirements of the statute, the Water Pollution Control Act provides at 33 U.S.C. 1367(d):

This section shall have no application to any employee who, acting without direction from his employer (or his agent) deliberately violates any prohibition of effluent limitation or other limitation under section 1311 or 1312 of this title, standards of performance under section 1316 of this title, effluent standard, prohibition or pretreatment standard un-

---

Act, 30 U.S.C. 815(c), P. L. 91-173, December 30, 1969; Water Pollution Control Act, 33 U.S.C. 1367, P. L. 92-500, October 18, 1972; Safe Drinking Water Act, 42 U.S.C. 300j-9, P. L. 93-523, December 16, 1974; Toxic Substances Control Act, 15 U.S.C. 2622, P. L. 94-469, October 11, 1976; Solid Waste Disposal Act, 42 U.S.C. 6971, P. L. 94-580, October 21, 1976; Surface Mining Act, 30 U.S.C. 1293, P. L. 95-87, August 3, 1977; Clean Air Act, 42 U.S.C. 7622, P. L. 95-95, August 7, 1977.

<sup>3</sup> In fact all of the employee protection acts enacted prior to Section 210, except the Mine Safety and Health Act, have the same 30 day deadline found in Section 210. *See*, 42 U.S.C. 300j-9(i)(2)(A); 15 U.S.C. 2622(b)(1); 42 U.S.C. 6971(b); 30 U.S.C. 1293(b).

<sup>4</sup> A requirement for a decision by the Secretary within 90 days is also found in the employee protection provisions of the Mine Safety and Health Act, 30 U.S.C. 815(c)(3), the Safe Drinking Water Act, 42 U.S.C. 300j-9(i)(2)(B), and the Toxic Substances Control Act, 15 U.S.C. 2622(b)(2).

der 1317 of this title, or any other prohibition or limitation established under this chapter.

A corresponding provision is found in the Clean Air Act at 42 U.S.C. Section 7622(g):

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter.<sup>5</sup>

And, with respect to judicial enforcement, the Clean Air Act contains language identical to that found in Section 210 (d)—allowing the Secretary to seek exemplary damages even though that remedy is not authorized at the administrative level. Thus, 42 U.S.C. Section 7622 (d) provides:

In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

Hence, rather than being tailored for nuclear safety concerns, the provisions relied upon by Respondent to show that Section 210 is an integral component of nuclear safety regulation turn out to be lifted, essentially verbatim, from the employee protection acts that Congress had passed in the years immediately preceding the enactment of Section 210. As shown by its legislative history, Section 210 was treated as "non-controversial", precisely because it mirrored, in virtually identical language, what Congress had previously enacted. Thus, to whatever extent the limited time frames, exclusionary provision, and exemplary damage subsections of Section 210 could be deemed as carefully considered choices on the part of Congress, those choices reflect nothing more than

---

<sup>5</sup> The following employee protection acts also have exclusionary provisions essentially identical to Section 210(g): the Safe Drinking Water Act, 42 U.S.C. 300j-9(i)(6), the Toxic Substances Control Act, 15 U.S.C. 2622(e), and the Solid Waste Disposal Act, 42 U.S.C. 6971(d).



a historically consistent practice of dealing with matters of administrative efficiency common to all employee protection statutes, irrespective of whether the regulated field touches upon the safety of mine workers, nuclear employees, the air, water or the general public.<sup>9</sup>

## II. THE LOWER COURTS ADDRESSED THE RULING IN *FARMER* IN A FEDERAL, AND NOT A STATE CONTEXT

On two occasions, Respondent asserts that the lower courts made a determination, under North Carolina law, that Ms. English's infliction of emotional distress claims were essentially entirely covered under Section 210 through correct application of "the labor preemption analysis enunciated in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977)." (Respondent's Brief pp. 28, 46-48) A review of the relevant provisions of the district court decision shows that Judge Dupree understood the holding of *Farmer*, but incorrectly failed to permit it to operate in the context of a state action.

In *Farmer*, a tort action for intentional infliction of emotional distress was allowed to proceed in the face of facts involving unfair labor practices over which the National Labor Relations Board had exclusive jurisdiction. As Respondent points out, in that decision, this Court indicated that the tort claims must be based on actions different from, or more extreme than the events that constitute "normal" unfair labor practice charges.

... it is essential that the state tort be either unrelated to employment discrimination or a function of the *particularly abusive manner* in which the discrimination is accomplished or threatened rather

<sup>9</sup> Respondent's argument about the existence of provisions allowing exemplary damages in two other employee protection statutes is equally unpersuasive. (See Respondent's Brief pp. 23, n.15, and 42) A much more plausible explanation is the general *ad hoc* nature of this legislation. (See Brief of Government Accountability Project pp. 18-19).

than a function of the actual or threatened discrimination itself.

*Farmer*, *supra*, at 305. (Emphasis added.)

The portion of Judge Dupree's decision relied-upon by Respondent is found at page 28a of the Appendix to the Petition. There Judge Dupree specifically addressed the holding in *Farmer* that there is "no federal protection offered by the NLRA against a union's outrageous conduct," and hence, a state claim for emotional distress to redress such outrageous conduct will not be preempted. Notwithstanding this clear holding, Judge Dupree concluded that the entirety of Mrs. English's concededly "valid cause of action [under North Carolina law]" (Pet. App. 27a) was preempted because, in his view, the conduct complained of concerned "terms, conditions, or privileges of employment" for which section 210 provided a remedy.

It is apparent that Judge Dupree's approach denied Mrs. English the right, contemplated and assured by *Farmer*, to have her allegations of "particularly abusive" or outrageous conduct evaluated against North Carolina's legal standards applicable to the tort of intentional infliction of emotional distress. Instead of following that mandate of *Farmer*, Judge Dupree essentially stripped from Mrs. English's valid state claim each allegation of abusive and outrageous conduct, one by one; and of what remained, Judge Dupree treated as merely outgrowths or functions of defendant's acts of discrimination. Such an approach, we submit, represents an incorrect application and distortion of the labor preemption analysis enunciated in *Farmer*.

## III. FEDERAL REMEDIES ARE PRESUMED TO SUPPLEMENT RATHER THAN SUPPLANT STATE-CREATED RIGHTS

This Court has recently, again, addressed the interaction of state and federal remedies. *Adams Fruit Company, Inc. v. Ramsford Barrett*, 58 U.S.L.W. 4367 (March 21,



1990). There, in construing a specific remedial provision, this Court cautioned that one must follow the "... basic principles of statutory construction that require giving effect to the meaning and placement of the words chosen by Congress" (Id. at 4368). It then concluded that both the state and federal remedies were available to the plaintiffs, because "... federal rights should be regarded as supplementing state-created rights unless otherwise indicated." Id. at 4369.

Contrary to Respondent's characterization, we have demonstrated in Point I, above, that Section 210 was clearly never perceived by Congress as anything other than labor relations statute. Thus the admonition in *Adams Fruit* that federal remedies are to be regarded as supplementing rights created by the states is particularly compelling, especially in light of this Court's rulings that pre-emption of state remedial legislation in the employment area is not to be lightly inferred, given that such remedies fall within the traditional police powers of the states. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. —, 96 L.Ed.2d 1, 17 (1987).<sup>7</sup>

<sup>7</sup> To infer pre-emption would leave employees with a remedy that is, in most respects, both substantively and procedurally inferior to the tort action. Not only does Section 210 deprive employees of full compensation and punitive damages, it also takes away the fundamental right guaranteed by the Seventh Amendment to a trial by jury. *Teamsters Local No. 391 v. Terry*, 58 U.S.L.W. 4345 (1990); *Lytle v. Household Manuf. Inc.*, 58 U.S.L.W. 4341 (1990); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. —, 109 S.Ct. 2782 (1989). Of perhaps even more significance, an employee in an administrative proceeding does not have the right to obtain necessary witnesses and documents through enforceable subpoenas, because of the lack of any statutory authority from Congress in Section 210, authorizing the issuance of subpoenas. See, *McCuiston v. Tennessee Valley Authority*, 89-ERA-006 (Order of February 28, 1983); *Billings v. Tennessee Valley Authority*, 87-ERA-5 (Order of March 28, 1988); and *Bohan v. Tennessee Valley Authority*, 87-ERA-28 (Order of October 30, 1987). See, generally, *United States v. Allis-Chalmers Corp.*, 498 F. Supp. 1027 (E.D.Wis. 1980).

## CONCLUSION

For the reasons contained herein, those previously submitted by Petitioner, and those contained in the briefs of *Amici* in support of Petitioner, this Court should conclude that Section 210 of the Energy Reorganization Act is not a nuclear safety act, and that it does not have preemptive effect upon, or otherwise preclude Petitioner from proceeding with, her state common law claim for intentional infliction of emotional distress.

This the 18th day of April, 1990.

Respectfully submitted,

M. TRAVIS PAYNE \*  
EDELSTEIN, PAYNE & NELSON  
P.O. Box 12607  
Raleigh, NC 27605  
(919) 828-1456

ARTHUR M. SCHILLER  
Attorney at Law  
Suite 430  
1920 N Street, N.W.  
Washington, DC 20036  
(202) 857-5658

\*Counsel of Record for Petitioner

MAR 8 1990

In the Supreme Court of the United States

JOSEPH E. SPANIOLO, JR.  
CLERK

OCTOBER TERM, 1989

---

VERA M. ENGLISH, PETITIONER

v.

GENERAL ELECTRIC COMPANY

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER

---

KENNETH W. STARR  
*Solicitor General*

JOHN G. ROBERTS, JR.  
*Deputy Solicitor General*

CHRISTOPHER J. WRIGHT  
*Assistant to the Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

ROBERT P. DAVIS  
*Solicitor of Labor*

ALLEN H. FELDMAN  
*Associate Solicitor*

STEVEN J. MANDEL  
*Counsel for Appellate Litigation*

JEFFREY A. HENNEMUTH  
*Attorney*  
*Department of Labor*  
*Washington, D.C. 20210*

---

---

### QUESTION PRESENTED

Whether Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, which provides a federal administrative remedy for employees who suffer employment discrimination in retaliation for making nuclear safety complaints, preempts an employee's state law tort claim based on such retaliation.



## TABLE OF CONTENTS

	Page
Interest of the United States .....	1
Statement .....	2
Summary of argument .....	7
<b>Argument:</b>	
Petitioner's state-law tort claim arising out of employer retaliation for making nuclear safety complaints is not preempted by federal law .....	9
A. Congress's occupation of the field of nuclear safety regulation does not preclude tort actions based on employer retaliation for making nuclear safety complaints .....	12
B. Section 210 does not occupy the field of nuclear whistleblower remedies or conflict with petitioner's claim .....	16
Conclusion .....	25

## TABLE OF AUTHORITIES

### Cases:

<i>Boyle v. United Technologies Corp.</i> , 108 S. Ct. 2510 (1988) .....	21
<i>Burdine v. Texas Dep't of Community Affairs</i> , 450 U.S. 248 (1981) .....	22
<i>California v. ARC America Corp.</i> , 109 S. Ct. 1661 (1989) .....	8, 19, 22
<i>De Canas v. Bica</i> , 424 U.S. 351 (1976) .....	10, 18
<i>Dickens v. Puryear</i> , 302 N.C. 437, 276 S.E.2d 325 (1981) .....	13
<i>English v. General Elec. Co.</i> , No. 85-ERA-2 (4th Cir. Jan. 13, 1987) .....	4
<i>English v. Whitfield</i> , 858 F.2d 957 (4th Cir. 1988) .....	3
<i>Farmer v. United Bhd. of Carpenters</i> , 430 U.S. 290 (1977) .....	7, 11, 13
<i>Fidelity Federal Savings &amp; Loan Ass'n v. De la Cuesta</i> , 458 U.S. 141 (1982) .....	9, 10

## IV

## Cases—Continued:

## Page

<i>Florida Lime &amp; Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963) .....	10
<i>Gaballah v. PG &amp; E</i> , 711 F. Supp. 988 (N.D. Cal. 1989) .....	15, 22, 24
<i>Goodyear Atomic Corp. v. Miller</i> , 486 U.S. 174 (1988) .....	15-16
<i>Hillsborough County v. Automated Medical Labs.</i> , 471 U.S. 707 (1985) .....	8, 18
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941) .....	10
<i>Jones v Rath Packing Co.</i> , 430 U.S. 519 (1977) ....	7, 11
<i>Kilpatrick v. Delaware County Society for Pre- vention of Cruelty to Animals</i> , 632 F. Supp. 542 (E.D. Pa. 1986) .....	17
<i>Lepore v. National Tool &amp; Mfg. Co.</i> , 224 N.J. Super. 463, 540 A.2d 1296 (1988), aff'd, 115 N.J. 226, 557 A.2d 1371, cert. denied, 110 S. Ct. 366 (1989) .....	17
<i>Malone v. White Motor Corp.</i> , 435 U.S. 497 (1978) .....	10
<i>Masters v. Daniel Int'l Corp.</i> , No. 88-1345 (10th Cir. Feb. 6, 1990) .....	14
<i>Metropolitan Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724 (1985) .....	10
<i>Motor Coach Employees v. Lockridge</i> , 403 U.S. 274 (1971) .....	19
<i>New York Dep't of Social Services v. Dublino</i> , 413 U.S. 405 (1973) .....	19
<i>Northwest Cent. Pipeline Corp. v. State Corp.</i> Comm'n, 109 S. Ct. 1262 (1989) .....	20
<i>Norris v. Lumbermen's Mut. Casualty Co.</i> , 881 F.2d 1144 (1st Cir. 1989) .....	14, 15, 21
<i>Pacific Gas &amp; Elec. Co. v. State Energy Resources Conservation &amp; Dev. Comm'n</i> , 461 U.S. 190 (1983) .....	7, 12, 13, 14, 16
<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987) .....	19
<i>Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.</i> , 485 U.S. 495 (1988) .....	11
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) .....	9, 10
<i>Savage v. Jones</i> , 225 U.S. 501 (1912) .....	11

## V

## Cases—Continued:

## Page

<i>Schneidewind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988) .....	9, 10, 14
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983) ..	9
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) .....	7, 8, 15, 16, 21, 23
<i>Stokes v. Bechtel N. Am. Power Corp.</i> , 614 F. Supp. 732 (N.D. Cal. 1985) .....	14
<i>Tafflin v. Levitt</i> , 110 S. Ct. 792 (1990) .....	11
<i>United Constr. Workers v. Laburnum Constr. Corp.</i> , 347 U.S. 656 (1954) .....	21
<i>Wheeler v. Caterpillar Tractor Co.</i> , 108 Ill.2d 502, 485 N.E.2d 372 (1985), cert. denied, 475 U.S. 1122 (1986) .....	15
<i>Woodruff v. Miller</i> , 64 N.C. App. 364, 307 S.E.2d 176 (1983) .....	13

## Constitution, statutes and regulation:

U.S. Const. Art. VI, Cl. 2 .....	9
Atomic Energy Act of 1954, 42 U.S.C. 2021(k) ....	12
Clean Air Act, 42 U.S.C. 7401 <i>et seq.</i> :	
42 U.S.C. 7416 .....	24
42 U.S.C. 7622 .....	24
42 U.S.C. 7622(b) (1) .....	24
42 U.S.C. 7622(g) .....	24
Comprehensive Environmental Response, Compen- sation and Liability Act of 1980, 42 U.S.C. 9601 <i>et seq.</i> :	
42 U.S.C. 9610 .....	24
42 U.S.C. 9610(b) .....	24
42 U.S.C. 9610(d) .....	24
42 U.S.C. 9614(a) .....	24
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a) .....	9
Energy Reorganization Act of 1974, 42 U.S.C. 5801 <i>et seq.</i> :	
§ 210, 42 U.S.C. 5851 .....	1, 3, 5, 8, 11, 16, 17, 19, 20, 21, 22, 23, 24, 25
§ 210(b) (1), 42 U.S.C. 5851(b) (1) .....	3, 6
§ 210(b) (2) (A), 42 U.S.C. 5851(b) (2) (A) ....	4, 5
§ 210(b) (2) (B), 42 U.S.C. 5851(b) (2) (B) ...	4, 6
§ 210(c)-(e), 42 U.S.C. 5851(c)-(e) .....	4

## VI

Statutes and regulation—Continued:	Page
§ 210 (d), 42 U.S.C. 5851 (d) .....	5, 8, 9, 22
§ 210 (g), 42 U.S.C. 5851 (g) .....	5, 8, 20, 21, 22
Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 758:	
§ 110 (b) (1), 83 Stat. 758 .....	19
§ 506, 83 Stat. 803 .....	19
Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1361 <i>et seq.</i> :	
33 U.S.C. 1367 .....	24
33 U.S.C. 1367 (b) .....	24
33 U.S.C. 1367 (d) .....	24
33 U.S.C. 1370 .....	24
National Labor Relations Act, 29 U.S.C. 151 <i>et seq.</i> .....	19
§ 8 (a) (4), 29 U.S.C. 158 (a) (4) .....	19
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 <i>et seq.</i> .....	17
29 U.S.C. 660 (c) .....	17
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 <i>et seq.</i> :	
42 U.S.C. 6929 .....	24
42 U.S.C. 6971 .....	24
42 U.S.C. 6971 (b) .....	24
42 U.S.C. 6971 (d) .....	24
Safe Drinking Water Act, 300f <i>et seq.</i> :	
42 U.S.C. 300g-3 (e) .....	24
42 U.S.C. 300j-9 (i) .....	24
42 U.S.C. 300j-9 (i) (2) (A) .....	24
42 U.S.C. 300j-9 (i) (6) .....	24
42 U.S.C. 300j-9 (i) (2) (B) (ii) (IV) .....	24
Toxic Substances Control Act, 15 U.S.C. 2601 <i>et seq.</i> :	
15 U.S.C. 2622 .....	23
15 U.S.C. 2617 (a) .....	24
15 U.S.C. 2622 (b) (1) .....	24
15 U.S.C. 2622 (b) (2) (B) .....	24
15 U.S.C. 2622 (e) .....	24
10 C.F.R. 30.7 .....	23

## VII

Miscellaneous:	Page
47 Fed. Reg. 54,585 (1982) .....	1, 23
W. Prosser, <i>Law of Torts</i> (4th ed. 1971) .....	13
S. Rep. No. 848, 95th Cong., 2d Sess. (1978) .....	19, 20
Statement of Robert P. Davis, Solicitor of Labor, before the Subcomm. on Labor-Management Re- lations, House Comm. on Education and Labor (Nov. 16, 1989) .....	18



**In the Supreme Court of the United States**

OCTOBER TERM, 1989

---

No. 89-152

VERA M. ENGLISH, PETITIONER

v.

GENERAL ELECTRIC COMPANY

---

*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

---

**INTEREST OF THE UNITED STATES**

Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, authorizes the Department of Labor to adjudicate allegations of employees who claim they have suffered employment discrimination in retaliation for making nuclear safety complaints. The Nuclear Regulatory Commission (NRC) does not participate in proceedings instituted under Section 210, but is extremely interested in learning of safety violations by licensees of nuclear facilities. See 47 Fed. Reg. 54,585 (1982). This case presents the issue whether Section 210 preempts state law tort remedies otherwise available to employees who suffer retaliation because they "blew the whistle" on nuclear safety violations. That issue implicates the De-

partment of Labor's programmatic interest in ensuring full and adequate relief to such employees and the NRC's interest in ensuring compliance with nuclear safety regulations; as a result, the United States has a substantial interest in the outcome of this case. The Court previously recognized the government's interest when, at the jurisdictional stage, it invited the Solicitor General to file a brief expressing the views of the United States.

### STATEMENT

Petitioner Vera English was employed from 1972 to 1984 as a laboratory technician at the nuclear fuels production facility in Wilmington, North Carolina, operated by respondent General Electric. In this diversity action, petitioner contends that General Electric retaliated against her for making nuclear safety complaints, and asserts a state law claim for intentional infliction of emotional distress. Pet. App. 2a, 6a-7a.

1. In February 1984, petitioner complained to General Electric's management and to the Nuclear Regulatory Commission (NRC) about a number of perceived violations of nuclear safety standards at the Wilmington facility. She complained in particular about the failure of her co-workers to clean up spills of radioactive materials in the laboratory.<sup>1</sup> Frustrated with her employer's failure to address her concerns, petitioner, on one occasion, deliberately failed to clean a work table contaminated during a preceding shift with a uranium solution. Instead, she outlined the contamination with red tape to bring

<sup>1</sup> Although petitioner made similar complaints over the years (Pet. 6), this action appears to be based solely on events occurring in 1984 (Pet. App. 2a, 7a-8a).

the matter to the other workers' attention. A few days later, petitioner showed her supervisor the marked-off areas, which had not been cleaned in the interim. As a result, work was halted while the laboratory was inspected and cleaned. Pet. App. 2a, 7a-9a; *English v. Whitfield*, 858 F.2d 957, 959 (4th Cir. 1988).

General Electric charged petitioner with a knowing failure to clean up contamination, and temporarily reassigned her to other work. On April 30, 1984, management informed her that she would be laid off unless she successfully bid within 90 days for a position in an area of the facility that did not involve exposure to nuclear materials. Pet. App. 2a, 9a-10a. On May 15, 1984, petitioner was notified of the final company decision affirming this disciplinary action. When petitioner had not found another position by July 30, 1984, her employment was terminated. *English v. Whitfield*, 858 F. 2d at 959, 960.<sup>2</sup>

2. On August 24, 1984, petitioner filed a complaint with the Secretary of Labor under Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, which prohibits employers from discharging or otherwise discriminating against "nuclear whistleblowers," i.e., employees who complain about nuclear safety violations.<sup>3</sup> Petitioner alleged that General

<sup>2</sup> Technically, petitioner was placed on layoff status on July 30, and thus retained certain benefits and recall rights. See Br. in Opp. 2 n.1; *English v. Whitfield*, 858 F.2d at 960 n.1. As a practical matter, however, she was no longer employed by General Electric after July 30, 1984.

<sup>3</sup> If an employee believes that he has been discharged or otherwise discriminated against in violation of Section 210(a), he may file a complaint with the Secretary of Labor within 30 days after the violation occurs. 42 U.S.C. 5851(b)(1). The Secretary investigates the alleged violation, holds a public

Electric's actions constituted unlawful employment discrimination in retaliation for her complaints to management and the NRC. Pet. App. 3a n.2, 31a. An administrative law judge found that General Electric had violated the Energy Reorganization Act when it transferred and then discharged petitioner. *Id.* at 30a-56a. The Secretary, however, dismissed the complaint as untimely because it had not been filed within 30 days after the May 15 notice of the final company decision. *English v. General Electric Co.*, No. 85-ERA-2 (Jan. 13, 1987). The Fourth Circuit affirmed that decision, but remanded for consideration of petitioner's separate claim that she was subjected to a continuing course of retaliatory harassment after the May 15 disciplinary decision. *English v. Whitfield*, *supra*. On remand, the ALJ also dismissed that claim as time-barred. *English v. General Electric Co.*, No. 85-ERA-2 (Recommended Decision and Order Apr. 5, 1989). The ALJ's recommended decision is pending before the Secretary.

3. In March 1987, petitioner filed this action against respondent in federal district court. Petitioner alleged that she had been terminated in violation of the public policy evidenced in federal nuclear safety laws and that she was suffering from severe depression and emotional difficulties as a result of

---

hearing, and, within 90 days of receiving the complaint, issues an order that either provides or denies relief. 42 U.S.C. 5851(b)(2)(A). If a violation is found, the Secretary may order reinstatement with back pay, award compensatory damages, and require the violator to pay the employee's costs and attorney's fees. 42 U.S.C. 5851(b)(2)(B). Any person adversely affected by an order of the Secretary may seek review in the federal court of appeals, and either the Secretary or the complainant may obtain enforcement of the Secretary's orders in federal district court. 42 U.S.C. 5851(c)-(e).

her employer's "intentional, malicious, extreme and outrageous conduct." Pet. 8; Pet. App. 6a, 11a. In addition to challenging General Electric's actions in transferring and ultimately firing her, petitioner alleged that General Electric had: (1) removed her from the laboratory position under guard "as if she were a criminal"; (2) assigned her to degrading "make work" in her substitute assignment; (3) derided her as "paranoid"; (4) barred her from working in controlled areas; (5) placed her under constant surveillance during work hours; (6) isolated her from co-workers, even during lunch periods; and (7) conspired to charge her fraudulently with violations of safety and criminal laws. Pet. App. 27a. Petitioner sought compensatory and punitive damages.

The district court granted General Electric's motion to dismiss. Pet. App. 6a-29a. The court first rejected the company's arguments that Section 210 regulates nuclear safety, a field preempted by the federal government. *Id.* at 17a, 18a. But it held (*id.* at 19a-23a) that three aspects of Section 210 nevertheless required it to conclude that petitioner's state law claims are preempted: (1) the provision barring recovery by any employee who "deliberately causes a violation of any requirement of [the Energy Reorganization Act] or of the Atomic Energy Act" (42 U.S.C. 5851(g)); (2) the absence of any provision for exemplary (or punitive) damage awards by the Secretary of Labor (42 U.S.C. 5851(b)(2)(B));<sup>4</sup> and (3) the requirement that whistleblowers

---

<sup>4</sup> The statute does, however, provide for the recovery of exemplary damages in civil actions brought by the Secretary to enforce her remedial orders in district court. See 42 U.S.C. 5851(d) (district courts "have jurisdiction to grant all appro-



file their administrative complaints within 30 days after the violations occur, and that the Secretary resolve such complaints within 90 days after filing (42 U.S.C. 5851(b)(1) and (2)(A)). As the court perceived it, Congress enacted these provisions to obtain speedy resolution of nuclear safety concerns, to limit exemplary damage awards against the nuclear industry, and to preclude reinstatement and compensation of employees who violate nuclear safety requirements—goals that the court found incompatible with the broader remedies available under state tort law. Pet. App. 21a-22a.<sup>5</sup>

In a per curiam opinion, the Fourth Circuit affirmed the dismissal of petitioner's emotional distress claim for the reasons stated by the district court. Pet. App. 1a-3a.<sup>6</sup> The court of appeals concluded that Congress had intended to foreclose nuclear whistleblowers from pursuing state tort remedies, and stated that the district court "correctly identified and applied the relevant federal and state law." *Id.* at 3a.

---

priate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages").

<sup>5</sup> The court alternatively held that petitioner had failed to state a cause of action for wrongful discharge because North Carolina law does not recognize the tort of wrongful discharge absent a specific duration employment contract, the giving of additional consideration for protected tenure, or a discharge for refusing to give perjured testimony. The court concluded that petitioner had stated a valid state law claim for intentional infliction of emotional distress. Pet. App. 24a-27a.

<sup>6</sup> Petitioner did not appeal the dismissal of her wrongful discharge claim, and that claim is accordingly no longer at issue.

## SUMMARY OF ARGUMENT

State law is preempted by implication where Congress has evidenced its intent to occupy a given field or where state regulation actually conflicts with federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). However, the intent to preempt must be "clear and manifest" where it involves a field traditionally occupied by the States (*Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)), and tort law is such a field (*Farmer v. United Bhd. of Carpenters*, 430 U.S. 290, 304 (1977)).

1. Congress has occupied the field of nuclear safety regulation. However, the district court correctly concluded that nuclear safety concerns are "only tangential" to petitioner's tort claim. Pet. App. 17a. Its decision that preemption is therefore not warranted on account of intrusion into nuclear safety matters is confirmed by this Court's decision in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 213 (1983). In that case, the Court upheld a state law establishing a moratorium on nuclear power plant certification because it determined that there was "a nonsafety rationale" supporting it. States have authorized awards for intentional infliction of emotion distress not because of any concern with nuclear safety, but because of their traditional interest in protecting citizens from abuse. *Farmer*, 430 U.S. at 302. Accordingly, such tort actions do not intrude on the field that Congress has occupied. That conclusion is also supported by the decision in *Silkwood*, where the Court held that state tort remedies for exposure to radiation are not preempted because Congress has not "expressly sup-  
planted" those remedies. 464 U.S. at 255.

2. The courts below erred by concluding that petitioner's claim for intentional infliction of emotional distress is preempted by Section 210, the "nuclear whistleblower" provision. Section 210 does not occupy a "field," but is merely a single statutory remedy for a particular type of employment discrimination by employers in a single industry. In any event, even a comprehensive regulatory scheme preempts state law only if there are "special features warranting preemption" (*Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 719 (1985)), and there are no "special features" in this case. Neither the statute nor its legislative history provide any reason to conclude that Congress intended to supplant, rather than supplement, state remedies.

None of the three provisions of Section 210 relied upon by the district court conflict with petitioner's claim in a manner that warrants preemption or indicates that Congress intended to occupy the field of nuclear whistleblower protection. Section 210(g), which provides that "Subsection (a) of this section" does not provide a remedy to employees who deliberately violate safety regulations, says nothing about state tort remedies. Moreover, any potential conflict can be eliminated by allowing employers to assert a federal law defense incorporating Section 210(g) in state actions. Nor does the absence of a provision in Section 210 authorizing the Secretary to award exemplary damages require preemption. "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law" (*California v. ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989)), and there is no evidence that Congress intended not to allow exemplary damage awards against operators of nuclear facilities. See *Silkwood*, 464 U.S. at 245 (affirming a

\$10 million punitive damage award against the operator of a nuclear facility); Section 210(d) (authorizing district courts to award exemplary damages in enforcement actions brought by the Secretary). Likewise, the expeditious time frames in Section 210 simply indicate that Congress wanted *federal* whistleblower complaints to be resolved quickly. That a 30-day limit for filing federal claims is not inconsistent with state regulation is clear from the fact that six other federal whistleblower statutes—each of which operates in a field where state regulation is not preempted—also have such a requirement.

#### ARGUMENT

##### PETITIONER'S STATE-LAW TORT CLAIM ARISING OUT OF EMPLOYER RETALIATION FOR MAKING NUCLEAR SAFETY COMPLAINTS IS NOT PRE-EMPTED BY FEDERAL LAW

State law is preempted under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, in three circumstances. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988); *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). In the first situation—not applicable here—Congress defines expressly the extent to which its enactments have preemptive effect. See, e.g., the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), construed in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-97 (1983). Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation \* \* \* so pervasive as to make reasonable the inference that Congress left



no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Schneidewind v. ANR Pipeline Co.*, 485 U.S. at 299-300 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230). Third, state law is preempted to the extent that it actually conflicts with federal law. Thus, preemption is inferred where it is impossible to comply with both federal and state requirements (see *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)), or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In all preemption inquiries, the "ultimate touchstone" is Congress's purpose in enacting the particular law claimed to have preemptive effect. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); see also *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. at 152 ("[t]he pre-emption doctrine \* \* \* requires us to examine congressional intent"); *De Canas v. Bica*, 424 U.S. 351, 363 (1976) (finding no preemption, even in the predominantly federal area of immigration regulation, where there was "affirmative evidence \* \* \* that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law"). Because preemption raises important and sensitive federalism concerns, it is presumed that Congress ordinarily does not intend to displace existing state authority.<sup>7</sup> Moreover, "[w]here \* \* \* the field which

<sup>7</sup> It is axiomatic that, "under our federal system, the States possess sovereignty concurrent with that of the Federal Gov-

Congress is said to have preempted has been traditionally occupied by the States," the intent of Congress to supersede state laws must be "clear and manifest." *Jones v. Rath Packing Co.*, 430 U.S. at 525; see also *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988) (congressional preemption of state regulation cannot be accomplished "subtly"); cf. *Savage v. Jones*, 225 U.S. 501, 533 (1912) (state law is deemed to be in conflict with an Act of Congress only if the "purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect").

Tort law is a field traditionally occupied by the States. In *Farmer v. United Bhd. of Carpenters*, 430 U.S. 290, 304 (1977), the Court recognized "the legitimate and substantial interest of the State in protecting its citizens" by allowing intentional infliction of emotional distress claims, and held that the plaintiff's claim was not preempted by the National Labor Relations Act. Since in this case there is no claim that Congress has expressly preempted state law, petitioner's intentional infliction of emotional distress action is preempted only if it is "clear and manifest" that the claim infringes on a field that Congress has occupied to the exclusion of the States or if there is an actual conflict between federal and state law such that allowing petitioner to go forward with her claim will frustrate the purposes underlying Section 210.

ernment, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 110 S. Ct. 792, 795 (1990).



**A. Congress's Occupation Of The Field Of Nuclear Safety Regulation Does Not Preclude Tort Actions Based On Employer Retaliation For Making Nuclear Safety Complaints**

Congress has occupied the field of nuclear safety regulation. However, the courts below correctly rejected General Electric's contention that petitioner's emotional distress claim is therefore preempted. As the district court explained, "while nuclear safety is of concern in this action it is only tangential to the action itself." Pet. App. 17a. This Court's decision in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), makes clear that where state law serves a valid purpose unrelated to nuclear safety, it is not preempted despite some relationship to nuclear matters.

A California law that imposed a moratorium on the certification of nuclear power plants until a state commission found that there had been a federally-approved technology for the disposal of nuclear wastes was at issue in *Pacific Gas & Elec. Co.* The Court held that the law was not preempted. Based on the legislative history of the Atomic Energy Act of 1954 and subsequent amendments, which showed that Congress intended exclusive federal regulation of "the radiological safety aspects involved in the construction and operation of a nuclear plant," the Court first concluded that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." 461 U.S. at 212. At the same time, the Court emphasized that this exclusive federal authority over safety matters does not extend to the regulation of nuclear facilities for economic and other non-safety purposes. *Id.* at 205-212; see, e.g., Atomic Energy Act, 42 U.S.C. 2021(k) ("[n]othing

in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards"). Accordingly, the Court held that whether the California moratorium was preempted depended on "whether there is a nonsafety rationale" supporting it. *Pacific Gas & Elec. Co.*, 461 U.S. at 213. The Court concluded that there was a valid economic purpose for the moratorium, since the California legislature was concerned that nuclear power plants might ultimately be shut down if acceptable permanent waste disposal methods were not developed, and upheld the law despite its relationship to nuclear power.

Petitioner's claim is not preempted because there is a nonsafety rationale supporting a state law action for intentional infliction of emotional distress. Indeed, unlike the California law at issue in *Pacific Gas & Elec. Co.*, emotional distress actions bear no special relationship to nuclear matters. Rather, they are generally available to victims of intentional harassment, and reflect the state's "substantial interest in protecting its citizens from the kind of abuse of which [petitioner] complain[s]." *Farmer v. United Bhd. of Carpenters*, 430 U.S. at 302; see also *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325, 331 (1981) (liability arises in North Carolina when "conduct exceeds all bounds usually tolerated by decent society" and "causes mental distress of a very serious kind," citing W. Prosser, *Law of Torts* § 12, at 56 (4th ed. 1971)); *Woodruff v. Miller*, 64 N.C. App. 364, 307 S.E.2d 176, 178 (1983) (recognizing that the tort of intentional infliction of emotional distress "provides an orderly way for the community to disapprove of [extreme and outrageous conduct] and compensate those victimized by it"). Thus, to an even greater extent than the moratorium

upheld in *Pacific Gas & Elec. Co.*, by which the state arguably sought to regulate plant construction for safety purposes, an emotional distress action has a basis in non-nuclear social and economic policy that saves it from preemption.<sup>8</sup>

<sup>8</sup> Because petitioner did not appeal from the dismissal of her wrongful discharge claim, whether such a claim would be preempted by Section 210 is not at issue. The arguments against preemption are less apparent in the context of a wrongful discharge complaint based on the public policy evidenced in federal nuclear safety laws since nuclear safety is a matter of exclusively federal concern. See *Pacific Gas & Elec. Co.*, 461 U.S. at 213 (“[a] state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field”); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. at 309 (state law preempted “whose central purpose is to regulate matters that Congress intended \* \* \* to regulate”). But that difference does not command a different result. Even though protection of whistleblower activity implicates nuclear safety concerns, a state tort action is not preempted under *Pacific Gas & Elec. Co.* if it also effectuates a public policy distinct from nuclear safety. While, as we have discussed, the nonsafety rationale for an emotional distress claim is manifest, similar policies underlie any other tort or contract remedies for wrongfully discharged employees. See, e.g., *Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144, 1152-1153 (1st Cir. 1989) (state interest in assuring good faith and fair dealing in commercial transactions, including employment contracts, and in promoting a general policy against termination of at-will employees in violation of a mandated public policy); *Stokes v. Bechtel N. Am. Power Corp.*, 614 F. Supp. 732, 741-742 (N.D. Cal. 1985) (state policy of “ensuring the continued employment and job security of its citizens \* \* \* and in advancing the state's economic productivity through the promotion of the nuclear industry”); but see *Masters v. Daniel Int'l Corp.*, No. 88-1345 (10th Cir. Feb. 6, 1990), slip op. 4 (Section 210 “preempts any state law claim for wrongful termination for reporting safety violations under the Act”).

The conclusion that petitioner's claim is not preempted on account of intrusion on the nuclear safety field is reinforced by this Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). In that case the Court held that state tort remedies for radiation-based injuries, including punitive damages, were available since “Congress assumed that traditional principles of state tort law would apply with full force unless they were *expressly supplanted*.” *Id.* at 255 (emphasis added). The Court reached that conclusion even though it recognized that “there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability.” *Id.* at 256. The relationship of petitioner's claim to nuclear safety concerns is certainly no more direct than in *Silkwood*, where the plaintiff's decedent was actually harmed by radiation. Thus, even though nuclear safety concerns are tangentially implicated by petitioner's suit, it is not barred since Congress has not provided that claims such as petitioner's are “*expressly supplanted*” by federal law.<sup>9</sup> See also *Good-*

<sup>9</sup> The *Silkwood* Court, in upholding tort remedies for radiation-related injuries, found “added significance” in the absence of any federal remedy for such injuries. See 464 U.S. at 251. But that was not the basis for the Court's decision. We agree with the First Circuit that, absent a clear expression of congressional intent, there is “no good reason for barring state remedies to whistle blowers but allowing punitive damages [for injuries] \* \* \* that might not have occurred if the whistleblower's complain<sup>t</sup>s had been investigated.” See *Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d at 1151; see also *Gaballah v. PG & E*, 711 F. Supp. 988, 990 (N.D. Cal. 1989) (finding *Silkwood* persuasive in the the whistleblower context); *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N.E.2d 372, 376 (1985) (same).



*year Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (an increased state workers' compensation award for injury caused by a safety violation at a government-owned nuclear facility is "incidental regulatory pressure" that Congress finds acceptable).

**B. Section 210 Does Not Occupy The Field Of Nuclear Whistleblower Remedies Or Conflict With Petitioner's Claim**

Although the courts below correctly recognized that petitioner's claim is not preempted by Congress's occupation of the field of nuclear safety, they went on to hold the claim preempted by Section 210. The district court first indicated that it was analyzing petitioner's claim and Section 210 to determine "whether there is an irreconcilable conflict between federal and state standards." Pet. App. 19a (quoting *Silkwood*, 464 U.S. at 256). After completing its conflict analysis, however, the court stated that it found the "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Pet. App. 22a-23a (quoting *Pacific Gas & Elec. Co.*, 461 U.S. at 204). Thus, the precise basis for the court's decision—i.e., whether it is grounded on the theory that Congress has occupied the field of nuclear whistleblower regulation or on the theory that petitioner's claim actually conflicts with Section 210—is not entirely clear. However, an intent to preempt is not properly inferred under either theory.

1. As an initial matter, it would be odd to conclude that nuclear whistleblowing, by itself, is a "field." Labor relations between nuclear employers and their employees might be a "field" that Congress would choose to occupy (but has not), as might issues relating generally to retaliation by employers

against their employees for blowing the whistle on unsafe or illegal activities. But Section 210 is merely a single statutory provision granting a remedy to employees in one industry for one type of discrimination by employers.<sup>10</sup> Section 210 is not a code of conduct governing nuclear labor relations comprehensively or a code governing whistleblowing generally.<sup>11</sup>

---

<sup>10</sup> It makes no difference that Section 210 bears some relationship to the nuclear safety field. As we have shown, and as the courts below concluded, petitioner's claim is not preempted on account of any infringement on the field of nuclear safety regulation. Moreover, the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, preempts state regulation of workplace safety and health with respect to matters governed by a specific federal standard, but does not preempt state law remedies for employees who suffer employment discrimination on account of their having filed complaints, testified, or otherwise exercised rights under the Act, even though the Act itself (29 U.S.C. 660(c)) provides a federal remedy for the same employer conduct. See *Lepore v. National Tool & Mfg. Co.*, 224 N.J. Super. 463, 540 A.2d 1296 (1988), *aff'd*, 115 N.J. 226, 557 A.2d 1371, cert. denied, 110 S. Ct. 366 (1989); accord *Kilpatrick v. Delaware County Society for Prevention of Cruelty to Animals*, 632 F. Supp. 542, 547-550 (E.D. Pa. 1986).

<sup>11</sup> In commenting on a bill that would provide comprehensive federal whistleblowing remedies, the Department of Labor recently recommended that Congress expressly preempt state remedies. Although General Electric finds it "inexplicabl[e]" that the government does not think that Section 210 preempts state law given its position on the pending legislation (see Supp. Br. in Opp. 3-4), the Solicitor of Labor explained that the Labor Department recommended preemption of state whistleblower remedies as part of "the proper balance to strike in the context of a uniform law" that "would apply to many different industries and situations," as distin-



In any event, the mere existence of a federal regulatory or enforcement scheme—even a rather comprehensive one—does not imply preemption of state remedies. As this Court has noted, “[u]ndoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. \* \* \* Instead, we must look for *special features* warranting preemption.” *Hillsborough County v. Automated Medical Labs.*, 471 U.S. at 719 (emphasis added). Thus, even where Congress has established a comprehensive regulatory or enforcement scheme, preemptive effect may not be inferred without specific indicia of legislative intent to exclude state activity in that field. See *id.* at 717 (“merely because the federal provisions [a]re sufficiently comprehensive to meet the need identified by Congress d[oes] not mean that States and localities [a]re barred from identifying additional needs or imposing further requirements in the field”); *De Canas v. Bica*, 424 U.S. at 359 (the “scope and detail” of the Immigration and Nationality Act does not evidence preemptive intent because the “comprehensiveness of legislation governing entry and stay of aliens [i]s to be expected in light of the nature and complexity of the subject”);

guished from the single-industry approach embodied in existing law. See Statement of Robert P. Davis, Solicitor of Labor, before the Subcomm. on Labor-Management Relations, House Comm. on Education and Labor, at 1 (Nov. 16, 1989). Moreover, an obvious difference exists between advocating policies in regard to pending legislation and interpreting the intent behind existing laws. If anything, the Labor Department’s support for express preemptive language in the proposed whistleblower legislation suggests its recognition that existing law does not preempt state remedies.

*New York Dep’t of Social Services v. Dublino*, 413 U.S. 405, 415 (1973) (“[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem”); cf. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (preemptive effect of ERISA’s “comprehensive” civil enforcement scheme is “fully confirmed” by its legislative history).<sup>12</sup>

An examination of the language and legislative history of Section 210 reveals no “special features” warranting a finding of preemptive intent. The statute simply prohibits employment discrimination against employees who make nuclear safety com-

<sup>12</sup> Respondent’s reliance (Br. in Opp. 14) on decisions construing the preemptive effect of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, is misplaced. As an initial matter, that statute comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective bargaining agreement. Moreover, special factors support the conclusion that preemption of state labor relations law is warranted—specifically, Congress’s perception that the NLRA was needed because state legislatures and courts were unable to provide an informed and coherent labor policy. See *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286 (1971). In addition, even though the drafters of Section 210 patterned it after Section 8(a)(4) of the NLRA, 29 U.S.C. 158(a)(4) (see S. Rep. No. 848, 95th Cong., 2d Sess. 29 (1978)), they also based it (see *ibid.*) on the corresponding provision of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 110(b)(1), 83 Stat. 758—in which Congress expressly declined to preempt state laws in the same field. See § 506, 83 Stat. 803. Thus, in Congress’s view, a whistleblower remedy, by itself, does not require preemption.

plaints and provides an administrative mechanism by which that prohibition can be enforced. Although its provisions are fairly detailed and comprehensive, the statute nowhere prohibits other remedies for the same conduct, or mandates procedures or remedies that are inherently inconsistent with other forms of relief. Moreover, as this Court recently observed, “[o]rdinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law.” *California v. ARC America Corp.*, 109 S. Ct. at 1667 (holding that indirect purchasers may sue under state law to recover overcharges resulting from unlawful price-fixing, even though federal antitrust laws allow only direct purchasers to recover). Therefore, the fact that a federal statute provides limited remedies does not require preemption, unless there is a “clear purpose of Congress” to that effect. See *ibid.*<sup>13</sup> Thus, the fact that Congress enacted Section 210 does not support the conclusion that it has “occup[ie]d” an entire field of regulation, leaving no room for the States to supplement federal law.” *Northwest Cent. Pipeline Corp. v. State Corp. Comm’n*, 109 S. Ct. 1262, 1273 (1989).

2. The district court found preemption based on its analysis of three provisions of Section 210—its bar to recovery by employees who deliberately violate

<sup>13</sup> The legislative history of Section 210 reveals no “clear purpose” to supplant state causes of action that might afford broader relief. Indeed, the only explanation for any of the statute’s remedial limitations is the responsible congressional committee’s statement that employees who deliberately violate nuclear safety requirements would be denied protection under Section 210(g) “[i]n order to avoid abuse of the protection afforded under this section.” S. Rep. No. 848, *supra*, at 30 (emphasis added).

federal nuclear safety requirements, the absence of any express provision for exemplary damage awards in the administrative proceedings, and the time limits for filing and adjudicating complaints. However, those limitations only purport to govern complaints brought under Section 210. Since Congress’s decision not to provide a particular remedy typically reflects only the federal policy objectives addressed by the statute in question, such policy choices do not generally imply an intent to preclude States from invoking their own remedies. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 255; *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-666 (1954).

Furthermore, a detailed analysis of the three provisions fails to indicate any conflict warranting preemption of petitioner’s claim. Section 210(g) provides that “Subsection (a) of this section shall not apply” where an employee deliberately causes a nuclear safety violation. Thus, Section 210(g) specifically limits its applicability to the remedy provided by Section 210(a), and does not suggest that it bars state-law actions. Moreover, any federal interest in prohibiting recovery by whistleblowers who participated in deliberate safety violations would be served by preempting state law only to the extent that it allows recovery by such violators. See *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2516 (1988) (observing that federal law preempts an entire body of state law only “where the federal interest requires a uniform rule” applicable to the subject area). Accordingly, Section 210(g), at most, would allow employers to assert a federal law defense against state law claims by employees excluded from Section 210’s protection. See *Norris v. Lumbermen’s Mut. Casualty Co.*, 881 F.2d 1144, 1150 (1st Cir.



1989); *Gaballah v. PG & E*, 711 F. Supp. 988, 990 (N.D. Cal. 1989).<sup>14</sup>

Nor does the absence of authorization for the Secretary to award exemplary damages under Section 210 imply legislative intent to bar state actions that permit such awards. Section 210(d) authorizes district courts to award exemplary damages in enforcement proceedings; thus, contrary to the district court, Section 210 does not reflect "an informed judgment that *in no circumstances* should a nuclear whistle[b]lower receive punitive damages when fired or discriminated against because of his or her safety complaints." Pet. App. 22a (emphasis added). In addition, since "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law" (*California v. ARC America Corp.*, 109 S. Ct. at 1667), there is no warrant for preemption merely because Congress did not authorize the Secretary to award

<sup>14</sup> Although the Secretary of Labor has not yet addressed the issue in the context of an actual whistleblower complaint, we believe that the courts below misinterpreted the scope of subsection (g). The purpose of Section 210 would be defeated if, as the district court contended, its protection does not extend to an employee who "has violated a separate and distinct [nuclear safety] requirement," but has "neither contributed to nor caused the potential safety violation which he reported." Pet. App. 20a. It is more sensible to construe subsection (g) as barring relief only for those employees who claim protection because they have "blown the whistle" on the very safety violation that they have caused. Moreover, in our view Section 210(g) is essentially a strict version of the causation element inherent in any anti-discrimination law. See *Burdine v. Texas Dep't of Community Affairs*, 450 U.S. 248 (1981). Thus, it serves to bar a remedy under the federal statute where it is plausible that the employer penalized the employee for his safety violation, not for his whistleblowing.

exemplary damages. See *Silkwood* (allowing exemplary damage awards in state actions for injury caused by exposure to radioactive materials).

Likewise, the expeditious time frames in Section 210 primarily indicate only that Congress wanted federal whistleblower complaints to be filed and resolved quickly. To be sure, the 30-day filing requirement also helps to ensure, in some cases, that the government is aware of safety violations.<sup>15</sup> Of course, that notification purpose is implicated only where an employer retaliates against an employee who has complained to his employer or has indicated his intention to alert federal authorities, but who has not yet blown the whistle to the federal government; if the retaliation is in response to whistleblowing to federal authorities, then they are already aware of the safety problem whether or not the employee files a discrimination action under Section 210. In any event, nothing about the 30-day time limit is incompatible with state actions. In six other whistleblower protection statutes enacted in the 1970s or early 1980s—the Toxic Substances Control Act (TSCA), 15 U.S.C.

<sup>15</sup> Section 210(b) requires the Secretary of Labor to notify the NRC "[u]pon receipt of \* \* \* a complaint" under the statute. Based on that provision, the two agencies have entered into a memorandum of understanding in which they agreed "to cooperate with each other to the fullest extent possible" in all cases arising under Section 210. 47 Fed. Reg. 54,585 (1982). As a result, the NRC is informed of any allegations of whistleblower discrimination, thus enabling that agency to address the underlying safety complaints and to impose its own sanctions on employers who retaliate against whistleblowing employees. See, e.g., 10 C.F.R. 30.7. In this case, the NRC imposed a \$20,000 fine on General Electric as a result of its investigation of petitioner's allegations. Pet. App. 57a.



2622; the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. 1367; the Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-9(i); the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6971; the Clean Air Act (CAA), 42 U.S.C. 7622; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9610—Congress also set a 30-day time limit for filing complaints,<sup>16</sup> although each of those other provisions exist in the context of a cooperative federal-state program that expressly permits concurrent state regulation. See TSCA, 15 U.S.C. 2617(a); FWPCA, 33 U.S.C. 1370; SDWA, 42 U.S.C. 300g-3(e); RCRA, 42 U.S.C. 6929; CAA, 42 U.S.C. 7416; CERCLA, 42 U.S.C. 9614(a). Thus, it is reasonable to assume that Congress intended Section 210 to supplement, not supplant, any state remedies that might exist. See *Gaballah v. PG & E*, 711 F. Supp. at 990.

Moreover, each of these six other whistleblower statutes denies coverage to deliberate violators of environmental statutes,<sup>17</sup> and only two expressly authorize the Secretary to award exemplary damages.<sup>18</sup> (In fact, the whistleblower provision of the Clean Air Act is virtually identical to Section 210.) The

<sup>16</sup> See TSCA, 15 U.S.C. 2622(b)(1); FWPCA, 33 U.S.C. 1367(b); SDWA, 42 U.S.C. 300j-9(i)(2)(A); RCRA, 42 U.S.C. 6971(b); CAA, 42 U.S.C. 7622(b)(1); CERCLA, 42 U.S.C. 9610(b).

<sup>17</sup> See TSCA, 15 U.S.C. 2622(e); FWPCA, 33 U.S.C. 1367(d); SDWA, 42 U.S.C. 300j-9(i)(6); RCRA, 42 U.S.C. 6971(d); CAA, 42 U.S.C. 7622(g); CERCLA, 42 U.S.C. 9610(d).

<sup>18</sup> TSCA, 15 U.S.C. 2622(b)(2)(B); SDWA, 42 U.S.C. 300j-9(i)(2)(B)(ii)(IV).

fact that state regulation is permitted under those other statutes shows that the three subprovisions of Section 210 on which the district court relied do not necessarily conflict with concurrent state regulation or evidence an intent by Congress to occupy the field.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*

JOHN G. ROBERTS, JR.  
*Deputy Solicitor General*

CHRISTOPHER J. WRIGHT  
*Assistant to the Solicitor General*

ROBERT P. DAVIS  
*Solicitor of Labor*

ALLEN H. FELDMAN  
*Associate Solicitor*

STEVEN J. MANDEL  
*Counsel for Appellate Litigation*

JEFFREY A. HENNEMUTH  
*Attorney*  
*Department of Labor*

MARCH 1990

No. 89-152

Supreme Court, U.S.

FILED

MAR 5 1990

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
Supreme Court of the United States

October Term, 1989

VERA M. ENGLISH,

*Petitioner,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

On Writ Of Certiorari To The United States  
Court of Appeals For The Fourth Circuit

BRIEF FOR THE ATTORNEY GENERAL OF NORTH  
CAROLINA, THE NORTH CAROLINA  
COMMISSIONER OF LABOR, AND THE NORTH  
CAROLINA ACADEMY OF TRIAL LAWYERS AS  
*AMICI CURIAE* SUPPORTING REVERSAL

LACY H. THORNBURG  
Attorney General of  
North Carolina

JOHN C. BROOKS  
North Carolina  
Commissioner of Labor

ANN CHRISTIAN  
General Counsel  
North Carolina Academy  
of Trial Lawyers

DONNELL VAN NOPPEN III  
MICHAEL G. OKUN  
SMITH, PATTERSON, FOLLIN,  
CURTIS, JAMES, HARKAVY  
& LAWRENCE  
Post Office Box 27927  
Raleigh, NC 27611  
(919) 755-1812

Counsel of Record for  
*Amici Curiae*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	3
I. North Carolina Has a Strong Interest in Pre- serving Its Common Law Right of Action for Intentional Infliction of Emotional Distress for All of Its Citizens .....	4
II. The Reasoning of the Courts Below Ignores the Important State Interests at Stake While in No Way Furthering the Federal Interest Served by Section 210 .....	7
CONCLUSION .....	11



## TABLE OF AUTHORITIES

Page

## CASES

<i>Brown v. Burlington Industries</i> , 93 N.C.App. 431, 378 S.E.2d 232, <i>pet. for disc. rev. granted</i> , 325 N.C. 270, 384 S.E.2d 513 (1989) .....	5, 6
<i>Dickens v. Puryear</i> , 302 N.C. 437, 276 S.E.2d 325 (1981) .....	4, 5
<i>Dixon v. Stuart</i> , 85 N.C.App. 338, 354 S.E.2d 757 (1987) .....	5
<i>Erwin Mills, Inc. v. Textile Workers Union of Ameri- ca</i> , 234 N.C. 321, 67 S.E.2d 372 (1951) .....	6
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977) .....	8, 11
<i>Hogan v. Forsyth Country Club</i> , 79 N.C.App. 483, 340 S.E.2d 116, <i>disc. rev. denied</i> , 317 N.C. 334, 346 S.E.2d 140 (1986) .....	5, 6
<i>Jones v. Rath Packing Company</i> , 430 U.S. 519 (1977) .....	3
<i>R.H. Bouligny v. United Steel Workers</i> , 270 N.C. 160, 154 S.E.2d 344 (1967) .....	6
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) .....	11
<i>Stanback v. Stanback</i> , 297 N.C. 181, 254 S.E.2d 611 (1979) .....	4
<i>Woodruff v. Miller</i> , 64 N.C.App. 364, 307 S.E.2d 176 (1983) .....	5

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Supremacy Clause, Art. VI, cl. 2 .....	4
29 U.S.C. § 151, <i>et seq.</i> .....	6

## TABLE OF AUTHORITIES - Continued

Page

42 U.S.C. § 5851 .....	<i>passim</i>
42 U.S.C. § 5851(d) .....	9
42 U.S.C. § 5851(g) .....	7
OTHER AUTHORITIES	
Hart and Wechsler, <i>The Federal Courts and the Fed- eral System</i> (1953) .....	7
Restatement (Second) of Torts, § 46 (1965) .....	4

No. 89-152

---

In The  
**Supreme Court of the United States**  
October Term, 1989

---

VERA M. ENGLISH,

*Petitioner,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

---

On Writ Of Certiorari To The United States  
Court of Appeals For The Fourth Circuit

---

BRIEF FOR THE ATTORNEY GENERAL OF NORTH  
CAROLINA, THE NORTH CAROLINA  
COMMISSIONER OF LABOR, AND THE NORTH  
CAROLINA ACADEMY OF TRIAL LAWYERS AS  
*AMICI CURIAE* SUPPORTING REVERSAL

---

**INTEREST OF *AMICI CURIAE***

This brief is filed pursuant to Rule 37.3 of the Rules of this Court, the written consent of all parties having been filed with the Clerk.

This case raises the question whether a state common law tort claim for intentional infliction of emotional distress is preempted by a federal statute providing an administrative remedy for an employee who suffers employment discrimination in retaliation for making nuclear safety complaints. The federal courts below held that North Carolina's tort claim is preempted and dismissed this diversity action. Those decisions violate this Court's long-standing pronouncements concerning preemption of state law by federal statute and ignore North Carolina's legitimate interests in deterring and remedying extreme and outrageous conduct suffered by its citizens. Because this Court's decision will have a direct effect on matters of prime importance to *amici*, and in order to state clearly for the Court the interests of the State of North Carolina in preserving its citizens' right of action for intentional infliction of emotional distress, *amici* submit this brief to assist the Court in its resolution of the case.

The Attorney General of North Carolina and the Commissioner of Labor are the constitutionally-established elected officers representing, respectively, the North Carolina Department of Justice and the North Carolina Department of Labor and have a vital interest in preserving the common law rights of North Carolina citizens. The North Carolina Academy of Trial Lawyers is a voluntary bar association of more than 3,000 North Carolina lawyers who represent persons who have suffered civil injury or face criminal prosecution. The Academy is an affiliate of the Association of Trial Lawyers of America, and both the North Carolina Academy and the national

organization regularly appear as *amicus curiae* in litigation affecting the common law and statutory rights of employees such as are raised in the present case.

---

## SUMMARY OF ARGUMENT

In order to provide its citizens a way to prevent and remedy outrageous conduct which intentionally or recklessly causes severe emotional distress, North Carolina recognizes a common law right of action for intentional infliction of emotional distress. In this and related contexts, North Carolina has aggressively preserved its citizens' rights of action to the maximum extent permitted by the Supremacy Clause. The courts below ignored these important state interests and misread Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, erroneously concluding that the federal statute conflicts with those interests.

---

## ARGUMENT

The course of this Court's preemption jurisprudence has established the fundamental presumption that federal legislation does not ordinarily nullify existing state law and "[w]here . . . the field which Congress is said to have pre-empted has been traditionally occupied by the States," the intent of Congress to supercede state laws must be "clear and manifest." *Jones v. Rath Packing Company*, 430 U.S. 519, 525 (1977). In the instant case, the courts below denigrated this fundamental principle of our federalist system by granting preemptive effect to the



limited federal administrative remedy provided by Section 210, thus nullifying for many North Carolina citizens their long-standing protection against intentional infliction of emotional distress. The courts below virtually ignored North Carolina's strong interest in preserving its common law right of action for intentional infliction of emotional distress and its clear and well-established policy of preserving state tort claims and remedies to the maximum extent permitted by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2.

**1. NORTH CAROLINA HAS A STRONG INTEREST IN PRESERVING ITS COMMON LAW RIGHT OF ACTION FOR INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS FOR ALL OF ITS CITIZENS.**

Like that of most states, the common law of North Carolina recognizes a right of action for extreme and outrageous conduct which is intended to and does cause severe emotional distress. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). A plaintiff who can establish that she has been the victim of conduct which was "extreme and outrageous [and] intentionally or recklessly causes severe emotional distress," may recover under North Carolina law for the damages caused by that conduct. *Dickens, supra*, 276 N.C. at 447, 276 S.E.2d at 332, quoting *Restatement (Second) of Torts*, § 46 (1965).<sup>1</sup> North

<sup>1</sup> The courts below correctly concluded that the plaintiff in this case sufficiently alleged the elements of intentional infliction of emotional distress and therefore properly denied

(Continued on following page)

Carolina law also provides that the limitations period for bringing such a claim is three years, *Dickens, supra*, 276 N.C. at 444, 276 S.E.2d at 330, that the claim may be presented to a jury, and that the full panoply of compensatory and punitive damages may be awarded. *Brown v. Burlington Industries*, 93 N.C.App. 431, 438, 378 S.E.2d 232, 236-237, *pet. for disc. rev. granted*, 325 N.C. 270, 384 S.E.2d 513 (1989).

North Carolina's interest in affording this right of action has best been described as providing "an orderly way for the community to disapprove of [extreme and outrageous conduct] and compensate those victimized by it." *Woodruff v. Miller*, 64 N.C.App. 364, 367, 307 S.E.2d 176, 178 (1983). In short, North Carolina has a distinct interest in encouraging civility within its borders by protecting this right of its citizens.

The fact that extreme and outrageous conduct occurs on the job in no way diminishes the claim, and North Carolina employees have been held to state claims for intentional infliction of emotional distress when they allege intentional and extreme ridicule and humiliation by their co-employees or supervisors. *Brown v. Burlington Industries, supra*; *Dixon v. Stuart*, 85 N.C.App. 338, 354 S.E.2d 757 (1987); *Hogan v. Forsyth Country Club*, 79 N.C.App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). Indeed, the North Carolina courts have consistently and aggressively preserved this

(Continued from previous page)

defendant's motion to dismiss for failure to state a claim upon which relief could be granted. (Pet. App. 26a-27a).

common law claim in the face of preemption arguments. For example, our courts reject arguments that job-related claims for intentional infliction of emotional distress are barred or preempted by the North Carolina Workers' Compensation Act. *Brown, supra*, 93 N.C.App. at 434-435, 378 S.E.2d at 234; *Hogan, supra*, 79 N.C.App. at 490, 340 S.E.2d at 121. Similarly, intentional infliction of emotional distress in the form of sexual harassment is held in North Carolina not to be preempted by the comprehensive federal system for remedying job-related sex discrimination and sexual harassment. *Id.* Thus, because of the value of this common law claim in deterring and remedying job-related extreme and outrageous conduct, North Carolina has resisted all attempts at preemption.

North Carolina has similarly pursued its established policy of preserving state law tort claims and remedies in related contexts. For example, despite the expansive preemptive effect wrought by the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, North Carolina has consistently sought to preserve tort claims to the maximum permissible extent. E.g., *R.H. Bouligny v. United Steel Workers*, 270 N.C. 160, 154 S.E.2d 344 (1967) (North Carolina will apply its law to effectuate tort claims and remedies except when "prevented" from doing so by clear federal law); *Erwin Mills, Inc. v. Textile Workers Union of America*, 234 N.C. 321, 67 S.E.2d 372 (1951).

North Carolina's interest in preserving its citizens' common law tort claims and remedies generally and its more specific interest in protecting the viability of the claim for intentional infliction of emotional distress is well-grounded in our federalism. Federal law is interstitial by nature, for its function is to fill gaps in regulation

which cannot be accomplished by the several states. Hart and Wechsler, *The Federal Courts and the Federal System*, at 435 (1953). Absent the clearest expression of Congressional intent to limit state remedies, therefore, courts have exercised restraint in permitting "federalization" of common law remedies. It is one thing for Congress to enact laws which provide for supplemental remedies; it is a much more serious business for a court to conclude that Congress has enacted an exclusive set of rules in a broad area such as the remedies available for extreme and outrageous conduct inflicted on persons who report nuclear safety violations. Certainly, the intent of Congress in enacting Section 210 was to broaden employee rights, not to confine them.

## II. THE REASONING OF THE COURTS BELOW IGNORES THE IMPORTANT STATE INTERESTS AT STAKE WHILE IN NO WAY FURTHERING THE FEDERAL INTEREST SERVED BY SECTION 210.

The district court apparently found irreconcilable conflicts between the State interests embodied in North Carolina's tort claim and three aspects of the administrative scheme established by Section 210. None of those conflicts are real; rather, the state tort claim is completely consistent with and furthers the purposes of Section 210.

First, the district court read the barring of administrative relief to an employee who has deliberately violated nuclear safety provisions, 42 U.S.C. § 5851(g), to indicate Congressional intent that a violator receive absolutely no compensation from any source. (Pet. App. 20a). This conclusion reaches too far, for it immunizes illegal, outrageous treatment of an individual. The district



court's reasoning may apply to a discharge claim, relieving the employer from liability for terminating the violator, but cannot justify, and immunize, extreme and outrageous conduct directed at the violator and intended to cause emotional distress. This Court has so held in the closely analogous circumstances presented in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977) (state's "substantial interest" in regulating outrageous conduct does not conflict with effective administration of pervasive federal scheme of regulating labor-management relations):

No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by petitioner . . . . Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct . . . which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." . . . [O]ur decisions permitting the exercise of state jurisdiction in tort actions [rest] . . . on the nature of the State's interest in protecting the health and well-being of its citizens.

*Id.* at 302-303. Similarly, Section 210 is grounded in no federal policy which would immunize an employer's engaging in outrageous conduct toward a violator of safety provisions.<sup>2</sup>

Second, the district court relied on the absence of any provision for punitive damages in an administrative

<sup>2</sup> The district court was also concerned with possible reinstatement of the violator, but reinstatement is not a remedy available for intentional infliction of emotional distress under our State's common law. The remedy instead is compensatory and possibly punitive damages.

claim by the nuclear safety whistleblower. (Pet. App. 21a-22a).<sup>3</sup> Regardless of the reasons for the Congressional determination not to make punitive damages available through the administrative process, that determination cannot be read to mean that in no circumstances should a nuclear whistleblower receive punitive damages, particularly in light of Congressional silence on the question. See Brief for the United States as *Amicus Curiae* on Petition for Writ of Certiorari, at 9-10. The availability of punitive damages when the retaliation has been carried out by means of extreme and outrageous conduct intended to cause severe emotional distress plainly furthers the intent of Congress in prohibiting such retaliatory conduct and providing a remedy. Congress more likely intended to provide compensatory damages for retaliation which occurs because of protected whistleblowing activity but without extreme and outrageous conduct, and to leave to state law questions of punitive damages where the additional element of outrageous conduct is present, a result entirely consistent both with ordinary tort principles and with principles of federalism. The important consideration is that North Carolina's punitive damages remedy is intended to punish those who engage in such outrageous conduct in North Carolina and to deter others who might.

Finally, the lower court reasoned that the thirty-day limitation period on the federal whistleblower administrative claim may express Congressional intent that such

<sup>3</sup> This concern, of course, disregards the availability of punitive damages in an enforcement action brought by the Secretary of Labor. 42 U.S.C. § 5851(d).



claims be brought quickly to the attention of regulatory authorities. (Pet. App. 22a). This observation does not, however, compel the conclusion that Congress meant to foreclose other remedies which states may allow to be invoked over a longer time. North Carolina has several interests in its three-year limitations period which are undermined by preemption. First, the victim is permitted time to assess her injuries and make a reasoned and deliberate choice about whether to make such a claim. Second, a victim of outrageous conduct is given sufficient time to assemble the resources and information necessary to obtain counsel and bring her claim. Third, the three-year period grants the parties time to attempt to settle claims before suit must be filed. None of these interests are served by a thirty-day claim deadline.

To effectuate fully its interests in deterring and remedying extreme and outrageous conduct, North Carolina has made available the three-year statute of limitations, the right to jury trial, and the possibility of punitive damages. Preemption denies North Carolina citizens the benefits of these protections. Preemption immunizes some employers from legitimate state tort claims while other employers are not so immunized. Conversely, preemption deprives this plaintiff of her claim while a co-worker at the same facility who alleges conduct equally extreme and malicious but not prompted by safety-related whistleblowing would retain the full tort remedy. North Carolina does not wish to have such a patchwork of remedies, providing a fair and orderly way to compensate those victimized by extreme conduct in some instances but not in others. Rather, North Carolina seeks to make available a remedy to all of its citizens for such

conduct. Similarly, each of the states has an evolving definition of the type of claim in issue here and the remedies available. Preemption federalizes the claim and cuts short that healthy and diverse evolution.

---

## CONCLUSION

Deterring and remedying extreme, malicious conduct is an interest of the State of North Carolina which is "deeply rooted in local feeling and responsibility." *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 296 (1977), quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-244 (1959). Preserving the State's means of serving that deeply rooted interest in no way conflicts with the federal purposes embodied in Section 210. Accordingly, the decision of the courts below should be reversed and the matter remanded for further proceedings on plaintiff's state law claim.

LACY H. THORNBURG  
Attorney General of  
North Carolina

JOHN C. BROOKS  
North Carolina  
Commissioner of Labor

ANN CHRISTIAN  
General Counsel  
North Carolina Academy of  
Trial Lawyers

DONNELL VAN NOPPEN III  
MICHAEL G. OKUN  
SMITH, PATTERSON, FOLLIN,  
CURTIS, JAMES, HARKAVY  
& LAWRENCE  
Post Office Box 27927  
Raleigh, NC 27611  
(919) 755-1812

Counsel of Record for  
*Amici Curiae*

(7)  
No. 89-152

Supreme Court, U.S.  
**FILED**  
**MAR 8 1990**  
JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1989

---

VERA M. ENGLISH, *et al.*,

*Petitioner,*

v.

GENERAL ELECTRIC COMPANY, *et al.*,

*Respondent.*

---

**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT**

---

**BRIEF OF AMICUS CURIAE  
THE GOVERNMENT ACCOUNTABILITY PROJECT IN  
SUPPORT OF PETITIONER**

---

Louis A. Clark  
(Counsel of Record)

Thomas E. Carpenter  
Edward A. Slavin, Jr.  
Richard Condit  
Sandra Peaches  
Government Accountability Project  
25 E Street, NW Suite 700  
Washington, DC 20001  
202-347-0460

35 PM

Table of Contents

INTEREST AND EXPERTISE OF AMICUS CURIAE .	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	5
THE FOURTH CIRCUIT'S DECISION FRUSTRATES THE PUBLIC POLICY OF PROTECTING AND ENCOURAGING WHISTLEBLOWERS .....	5
Introduction .....	5
A. Congressional Policy Uniformly Has Been To Encourage Whistleblowing as Essential for Effective Law Enforcement .....	6
B. Whistleblower Protection Legislation Is Remedial and to be Liberally Construed .....	10
C. Congress Did Not Intend to Shrink Whistleblower Remedies .....	15
D. Case Law Supports a Finding of No Preemption	24
<u>CONCLUSION</u> .....	26

No. 89-122

In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1989

VERA M. ENGLISH, et al.,

GENERAL ELECTRIC COMPANY, et al.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE  
THE GOVERNMENT ACCOUNTABILITY PROJECT IN  
SUPPORT OF PETITIONER

Louis A. Clark  
(Counsel of Record)

Thomas E. Carpenter  
Edward A. Slavin, Jr.  
Richard Condit  
Sandra Peaches  
Government Accountability Project  
25 E Street, NW, Suite 700  
Washington, DC 20001  
202-347-0460



## TABLE OF AUTHORITIES

Cases

<i>Brock v. Roadway Express</i> , 481 U.S. 252 (1987) . . . .	11
<i>Bush v. Lucas</i> , 462 U.S. 367 (1983) . . . . .	15
<i>California v. ARC America Corp.</i> , 109 S.Ct. 1661 (1989) . . . . .	12, 13
<i>Chevron, U.S.A. v. NRDC</i> , 467 U.S. 837 (1984) . . . .	26
<i>Chrisman v. Phillips Industries</i> , 242 Kan. 772, 751 P.2d 140 (1988) . . . . .	25
<i>Cotton v. Fisheries Products Co.</i> , 181 N.C. 151, 106 S.E. 487 (1921) . . . . .	18
<i>English v. GE</i> , 683 F. Supp. 1006 (E.D.N.C.1988) <i>aff'd per curiam</i> , 871 F.2d 22 (4th Cir. 1989) . . . . .	16, 19
<i>Fidelity Federal Savings &amp; Loan Association v. DeLaCuesta</i> , 458 U.S. 141 (1982)5	
<i>Florida Lime &amp; Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)) . . . . .	5
<i>Gaballah v. PG&amp;E</i> , 711 F.Supp. 988 (N.D. Cal 1989) . . . . .	13, 25
<i>General Electric v. Gilbert</i> , 429 U.S. 125 (1976) . . . .	13
<i>Holy Trinity Church v. United States</i> , 143 U.S. 457 (1892) . . . . .	24

<i>Huckle v Money</i> , 95 Eng.Rep. (K.B.1782) .....	18
<i>Lingle v. Norge Division of Magic Chef</i> , 486 U.S. 399 (1988) .....	5
<i>McLaren v. Fleischer</i> , 256 U.S. 477 (1921) .....	27
<i>Munsey v. Federal Mine Safety &amp; Health Review Comm.</i> , 595 F.2d 735 (D.C. Cir. 1978) .....	8
<i>Norris v. Lumbermen's Mut. Casualty Co.</i> , 881 F.2d 1144 (1st Cir. 1989) .....	25
<i>Olguin v. Inspiration Consolidated Copper Co.</i> , 740 F.2d 1468 (9th Cir. 1984) .....	25
<i>Pacific Gas &amp; Electric Co. v. State Energy Resources Conservation &amp; Development Commission</i> , 461 U.S. 190 (1983) .....	5, 13, 28
<i>Parklane Hosiery v. Shore</i> , 439 U.S. 322 (1979) .....	16
<i>Phillips v. Board of Mine Operations Appeals</i> , 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975) .....	8
<i>Phipps v. Clark Oil and Refinery Co.</i> , 396 N.W.2d 588 (Minn.Ct.App. 1986) aff'd 408 N.W.2d 569 (Minn. 1987) .....	25
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)) .....	5
<i>Silkwood v. Kerr-McGee</i> , 464 U.S. 238 (1984) .....	3, 13

<i>Stokes v. Bechtel N. Am. Power Corp.</i> , 614 F. Supp. 732 (N.D. Cal. 1985) .....	26
<i>Udall v. Tullman</i> , 380 U.S. 1 (1965) .....	26
<i>United States v. Brown</i> , 333 U.S. 18 (1947) .....	24
<i>United States v. Kirby</i> , 74 U.S. (7 Wall.) 482 (1869) .....	23
<i>United States v. Turkette</i> , 452 U.S. 576 (1980) .....	26
<i>Wheeler v. Caterpillar Tractor Co.</i> , 108 Ill. 2nd 502, 485 N.E.2d 372 (Ill. 1985) cert. denied, 475 U.S. 1122 (1986) ....	25
<i>Wiggins v. Eastern Associated Coal Co.</i> , 357 S.E.2d 745 (W.Va.1987) .....	24

#### Administrative Decisions

<i>Nolder v. Ramond Kaiser Engineers, Inc.</i> , No. 84-ERA-5 (D.O.L., June 28, 1985) .....	26
<i>Willy v. Coastal Corp.</i> , 85-CAA-1 at 4, Decision and Order of Remand of the Secretary of Labor (June 4, 1987) .....	8

Statutes

42 U.S.C. Section 5851 .....	2
42 U.S.C. Section 300j-9(i)(2)(B)(ii)) .....	18
42 U.S.C. Section 7622 (1988) .....	25
33 U.S.C. Section 1367 (1988) .....	25
30 U.S.C. Section 815(c)(1988). ....	25
1 C.F.R. Section 305.87-2. ....	19

Legislative Materials

124 Cong. Rec. 27548 (S14280) (daily ed. Aug 24, 1978) (statement of Sen. Sasser) .....	4
1978 U.S. Code Cong. & Ad. News 7303 .....	10
1977 U.S. Code Cong. & Ad. News, 1077, 1404. ....	10
118 Cong.Rec. 10,766-768 (1972) reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972, at 655. ....	12
U.S. Code Cong. & Ad. News 7303 .....	16
134 Cong. Rec. S1447 (daily ed. Feb. 25, 1988) ....	21

*To Strengthen the Protections Available  
to Employees Against Reprisals for Disclosing  
Information, to Protect the Public Health and Safety,  
and for Other Purposes: Hearing on S.436 Before the  
Subcomm. on Labor of the Senate Committee on  
Labor and Human Resources, 101st Cong., 1st Sess.  
37-39 (1989)(statement of Sen. Charles Grassley). 23*

Other Authorities

H. Perrit, <i>Employee Dismissal Law and Practice</i> , 1987	6
Kohn & Carpenter, <i>Nuclear Whistleblower Protection and the Scope of Protected Activity Under Section 210 of the Energy Reorganization Act</i> , 4 Antioch L.J. 73, 74 (1986) .....	6
Sands, <i>Sutherland Statutory Construction</i> , Sec. 60.02, (4th Ed. 1986) .....	12
Dobbs, <i>Remedies</i> (1973) .....	18
Eugene R. Fidell, "Federal Protection of Private Sector Health and Safety Whistleblowers," 2 <i>Administrative Law Journal</i> (1988) .....	19
M. P. Glazer & P. M. Glazer, <i>The Whistleblowers -- Exposing Corruption in Government and Industry</i> (1989) . ....	24



In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1989

---

No. 89-152

---

VERA M. ENGLISH, *et al.*,  
*Petitioner,*

v.

GENERAL ELECTRIC COMPANY, *et al.*,  
*Respondent.*

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT

---

BRIEF OF AMICUS CURIAE  
THE GOVERNMENT ACCOUNTABILITY PROJECT  
IN SUPPORT OF PETITIONER

---

INTEREST AND EXPERTISE OF AMICUS CURIAE

The Government Accountability Project (GAP), an *amicus* below, is a public interest group whose staff attorneys represent employee whistleblowers and speak on their behalf before Congress and other forums. *Amicus* works with whistleblowers to expose environmental, safety and health problems, fraud, crimes and waste of federal funds. It is a non-partisan, tax-exempt group founded in Washington, D.C. in 1977.

GAP staff members worked to win enactment of the Whistleblower Protection Act of 1989, passed unanimously by Congress and signed into law by President Bush. GAP attorneys have counselled and represented hundreds of government and corporate employees, including many with cases filed pursuant to Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851. GAP has been instrumental in helping whistleblowers expose problems at nuclear powerplants, including the Zimmer (Ohio) and Midland (Michigan) plants, (with Zimmer now coal-fired and Midland now gas-fired), as well as nuclear weapons plants (among them Fernald, Ohio; Hanford, Washington; and Rocky Flats, Colorado).

GAP is filing this brief to provide the perspective of the whistleblowers who the *amicus* believes are essential to open, accountable, law-abiding business and government conduct. In the nuclear safety arena, in which this case arises, honest employee whistleblowers often make the difference between well-constructed and safely operated nuclear facilities and life-threatening ones. The United States Congress made a clear choice to provide protection for these employees - - not to limit their state law remedies. For this reason GAP is filing this *amicus* brief in support of the petitioner, Vera English.

### SUMMARY OF ARGUMENT

The decision below cancels longstanding states' rights in private employment law, strips whistleblowers of significant rights and remedies, and threatens federal

law enforcement objectives involving the nuclear industry.

The nuclear industry appears to have learned little since this Court decided *Silkwood v. Kerr-McGee*, 464 U.S. 238, 258 (1984), establishing that the nuclear industry is liable under state law tort actions. Vera English's harassment and firing occurred within months of the *Silkwood* decision, a decision that placed General Electric on notice of its liability for intentional torts perpetrated against outspoken employees.

Likewise, nowhere in the expanding body of federal whistleblower statutes is there any hint of an attempt to preempt state tort actions for intentional infliction of emotional distress, or any other tort action. In numerous environmental statutes state and federal authorities share overlapping, complementary responsibilities for employee protection. Congress never demonstrated any intent to preempt tort jurisdiction of employment actions, an area traditionally regulated by the states.

Left intact, the decision below would deny states the authority to provide, and all American nuclear employees to receive jury trials, punitive damages, and other remedies currently afforded to employees in a majority of states. The decision below relies on the premise that Congress somehow sought to preempt the pre-existing or potential tort law of fifty states -- in one fell swoop without explicit or implicit indication in any statute or supporting legislative history. There is no evidence that Congress intended to strip nuclear whistleblowers of access to state law. To the contrary,

Congress recognized the importance of -- and sought to encourage -- environmental, safety and health disclosures as furthering public policy. As the Chairman of the Civil Service Subcommittee stated during debate on the 1978 Civil Service Reform Act:

It should be public policy to encourage whistleblowing rather than chill it.

124 *Cong. Rec.* 27548 (S14280)(daily ed. Aug 24, 1978)  
(statement of Sen. Sasser)

The Fourth Circuit's decision in *English v. General Electric Co.*<sup>1</sup> unfairly turns the federal statute into a Procrustean bed, giving only one federal administrative remedy to nuclear whistleblowers in states with well-developed bodies of law for intentional infliction of emotional distress and other state law actions that can be filed against employers. This result would defeat the statutory objective, stand Congressional intent on its head, and effectively discriminate against whistleblowers, placing them at a significant disadvantage compared to similarly-situated employees. This odd result flies in the face of the long-established Congressional policy of encouraging and protecting such workers. Section 210 of the Energy Reorganization Act was intended to be a vehicle for supplementing and reinforcing accountability of the nuclear industry, not shrinking it.

<sup>1</sup> *English v. General Electric Co.*, 683 F.Supp. 1006 (E.D.N.C.1988), *aff'd*, 871 F.2d 22 (4th Cir. 1989).

## ARGUMENT

### I. THE FOURTH CIRCUIT'S DECISION BELOW FRUSTRATES THE PUBLIC POLICY OF PROTECTING AND ENCOURAGING WHISTLEBLOWERS

#### Introduction

As this Court has explained, absent a specific federal statutory mandate, there are several other circumstances which make preemption necessary, -- (1) when there is pervasive federal regulation of an entire field, (*Fidelity Federal Savings & Loan Association v. DeLaCuesta*, 458 U.S. 141 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)); (2) when compliance with both federal and state regulation is impossible, (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)); or (3) when a state regulation interferes with the objective of the federal regulation (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983)). Since Section 210 is silent on preemption, the issue turns on a finding of whether the field of employment relations is an area pervasively occupied by the federal government; simultaneous compliance with Section 210 and state law is impossible; or the state regulation interferes with the objectives of Section 210. *Amicus* submits that the federal government has not pervasively occupied the field of employment relations, as demonstrated by the fact that currently a majority of states have some form of "public policy exception" to the employment-at-will



doctrine.<sup>2</sup> Additionally, state tort law, far from interfering with the objectives of Section 210, in fact enhances achievement of the federal statutory goals. The Fourth Circuit's decision below would accomplish the counterproductive result of stifling disclosure.

**A. Congressional Policy Uniformly Has Been To Encourage Whistleblowing as Essential for Effective Law Enforcement**

Whistleblowers are courageous people who report safety, health, environmental and other hazards, and violations of criminal and civil laws by their employers.<sup>3</sup> Also termed "ethical resisters,"<sup>4</sup> whistleblowers are unique. Congress, as well as federal and state regulatory and law enforcement agencies have all relied on whistleblowers as sources of information for investigations. Whistleblowers are increasingly treated as members of an expanding group of employees protected by federal law. Quite simply they are the

<sup>2</sup> See, generally, H. Perrit, *Employee Dismissal Law and Practice*, (1987).

<sup>3</sup> Kohn & Carpenter, *Nuclear Whistleblower Protection and the Scope of Protected Activity Under Section 210 of the Energy Reorganization Act*, 4 Antioch L.J. 73, 74 (1986).

<sup>4</sup> M. P. Glazer & P. M. Glazer, *The Whistleblowers -- Exposing Corruption in Government and Industry* (1989) at 4, coining the term ethical resister "to denote their commitment to the principles we all espouse -- honesty, individual responsibility, and active concern for the public good." In their academic study, the Glazers discuss case studies of whistleblowers, many of whom suffered severe emotional distress due to retaliation for making disclosures.

eyewitnesses upon whom effective law enforcement so often depends.

Congress, recognizing these policy objectives, has included whistleblower protection provisions in over a dozen pieces of public health, environmental and safety legislation.<sup>5</sup> A compelling declaration of Congressional intent in the area of whistleblower legislation is found in the Civil Service Reform Act of 1978.<sup>6</sup> As the Senate committee report explained:

Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse . . . . Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service . . . . What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses . . . . These conscientious civil servants deserve statutory

<sup>5</sup> See, e.g., Asbestos Hazard Emergency Response Act of 1986 (AHERA), Pub. L. 99-519, §211, 100 Stat. 2970 (to be codified at 15 U.S.C. §2641); Clean Air Act (CAA), Pub. L. 95-95, 42 U.S.C. § 7622 (1982); Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §601 (1982); Department of Defense Authorization Act of 1987 (DOD87), Pub. L. 99-661, §42, 100 Stat. 3816 (to be codified at 10 U.S.C. §409); Safe Drinking Water Act, 42 U.S.C. § 300j-9; Water Pollution Control Act, 33 U.S.C. §136; Toxic Substances Control Act, 15 U.S.C. § 2622.

<sup>6</sup> Civil Service Reform Act, Pub. L. 95-454, 92 Stat. 1111 (codified as amended in various sections of Title 5 of the United States Code).

protection rather than bureaucratic harassment and intimidation.<sup>7</sup>

Legislative attention to incorporate employee protection provisions within statutes followed the 1969 Farmington mine disaster. Safety reforms were enacted for the mining industry in the ensuing Coal Mine Health and Safety Act, which established protections for miners who report safety problems to the government or their employer. *See, Phillips v. Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975).

Provisions adopted later in other health and safety laws were patterned after the mine safety legislation. Consequently, the agency responsible for the interpretation of many of these separate employee protection provisions interprets them "in a parallel manner." *Willy v. Coastal Corp.*, 85-CAA-1 at 4, Decision and Order of Remand of the Secretary of Labor (June 4, 1987); *see, also*, 29 CFR § 24.2, which interprets Section 210 in the same manner as the provisions contained in several environmental statutes. The reason Congress has protected whistleblower employees through federal statutes is clearly "to encourage reporting." *Munsey v. Federal Mine Safety & Health Review Comm.*, 595 F.2d 735, 743 (D.C. Cir. 1978). This legislative goal is essential to understanding why maintaining state torts *enhances* federal regulatory goals, and why the Fourth Circuit's position *frustrates* it. Encouraging employees to report problems is

<sup>7</sup> Senate Report No. 95-969 as reported in 1978 U.S. Code Cong. and Ad. News, at 2730.

essential to enforcement of federal law.

In fact, in February 1990, the American Bar Association House of Delegates voted to support federal whistleblower legislation similar to Section 210 for all private sector workers reporting safety, health and environmental problems, as well as any violation of federal statute or regulation.<sup>8</sup>

---

<sup>8</sup> As the proponents of the ABA resolution successfully argued:

It is in the interest of all employers as well as employees to protect "whistleblowers." It is often the case that only "whistleblowers" have the courage to carry bad news to executive suites, while middle-level managers who may wish to protect their jobs will not inform senior management of developing problems. Since safety and health threats can also threaten corporate futures and profits with civil liability and unfavorable publicity, it is also in the interest of stockholders and corporations to keep the lines of communication open to information from employees who are intimately familiar with company shortcomings.

The recent examples of corporations in Bankruptcy Court as a result of tort liability for products that threaten safety and health clearly make the need for protecting corporate employees more urgent than ever.

*See e.g.*, p. 2 of the Report and Recommendation to the ABA House of Delegates accompanying Resolution 125 from the Young Lawyers Division, National Conference of Administrative Law Judges, and Section of Individual Rights and Responsibilities, in Volume II Reports with Recommendations to the House of Delegates, 1990 Midyear Meeting (not sequentially paginated).



According to the legislative history, Section 210 of the Energy Reorganization Act was patterned after the Clean Air Act, 42 U.S.C. §7622 (1988), the Federal Water Pollution Control Act, 33 U.S.C. §1367 (1988) and the Federal Mine Safety and Health Act, 30 U.S.C. §815(c)(1988). *See*, 1978 U.S. Code Cong. & Ad. News 7303. The legislative history emphasizes the desire of Congress to ensure employee input and protection:

The best source of information about what a company is actually doing or not doing is often its own employees and this amendment will ensure that an employee could provide such information without losing his job or otherwise suffering economically from retribution from the polluter.

Legislative history of the Federal Water Pollution Control Act cited in Conference Report of Clean Air Act, 1977 U.S. Code Cong. & Ad. News, 1077, 1404.

In an age where limited agency resources produce desuetude by default -- government inability or refusal to enforce many health and safety laws -- reliance on employees for quick reliable information is an efficient and effective means to ensure compliance and enforcement.

#### **B. Whistleblower Protection Legislation Is Remedial and to be Liberally Construed**

The Fourth Circuit clearly was wrong to hold that Section 210's federal scheme would be frustrated by

pursuing state law remedies. Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851, passed in 1978, was Congress' effort to provide a national standard of minimum protection for nuclear workers in all states who expose problems potentially affecting the public health and safety. As demonstrated below, Congress never intended to deny these courageous employees the traditional state court remedies afforded all citizens. Clearly, Congress meant to protect, and thus to encourage, workers who report threats to public health and safety.

The most effective way to prevent whistleblowing disclosures would be to cancel existing remedies for whistleblowers, who risk career martyrdom when they report illegalities. Employers too often retaliate against whistleblowers by discharging, demoting, blacklisting, transferring, or isolating them.<sup>9</sup> Fear of reprisal is a powerful reason why would-be whistleblowers remain silent.

As a result, consistent with public policy objectives, Section 210 and the whistleblower statutes generally are remedial and to be liberally construed. *See e.g., Brock v. Roadway Express*, 481 U.S. 252 (1987). Representative William D. Ford (D.Mich), in offering an amendment to the Federal Water Pollution Control Act employee protection provision, reinforced this view:

Mr. Chairman, in offering this amendment we are only seeking to protect workers and

---

<sup>9</sup> *See*, M. Glazer & P. Glazer, *The Whistleblowers -- Exposing Corruption in Government and Industry* (1989) at 3.



communities from those very few in industry who refuse to face up to the fact that they are polluting our waterways, and who hope that by pressuring their employees and frightening communities with economic threats, they will gain relief from the requirement of any effluent limitation or abatement order. [Emphasis added].

118 *Cong. Rec.* 10,766-768 (1972) reprinted in *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 655.

The remedial construction of Section 210 is evident in its statutory language.<sup>10</sup> Remedial statutes are defined as those "which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries." Sands, *Sutherland Statutory Construction*, Sec. 60.02, (4th Ed. 1986). This definition is clearly in keeping with this Court's holding in *California v. ARC America Corp.*, 109 S.Ct. 1661 (1989). At issue was the state tort remedy which provided for relief in addition to that of the federal statute.<sup>11</sup> Further Sutherland states that

<sup>10</sup> Section 210 expressly authorizes the Secretary of Labor to file in Federal District Court a civil action enforcing reinstatement orders of whistleblowers. The district court in such an action "shall have jurisdiction to grant all appropriate relief . . . ." 42 U.S.C. Sec. 5851(d)

<sup>11</sup> The court held that a state tort remedy which provides relief that is in addition to that provided by a federal statute cannot be a basis for the conclusion that the state tort remedy

"[r]emedial statutes are liberally construed to suppress the evil and advance the remedy." Sands, *supra* at Sec. 60.01. This Court additionally has held that the goal of judicial construction is to effect the intent of the legislature in promoting nondiscriminatory employment practices. *General Electric v. Gilbert*, 429 U.S. 125 (1976).

Section 210 of the Energy Reorganization Act while well-intentioned is, by itself, a woefully inadequate remedy as a vehicle to encourage and protect employees who make important disclosures. This line of reasoning led to the rejection of the preemption theory by at least one district court. *Gaballah v. PG&E*, 711 F.Supp. 988, 990 (N.D. Cal 1989). The federal government does not occupy the field of whistleblower protection, as states also act to protect whistleblowers. At least ten states have statutory exceptions to the common law rule of employment at will for private workers.<sup>12</sup> Congress is aware of this fact, and it is apparent from the limited remedy afforded.

---

has been preempted. *California v. ARC America Corp.*, 490 U.S. --- ; 104 L.F.L.2d 86 (1989). See also, *Pacific Gas and Electric*, 461 U.S. 190, 212-13 (1983), and *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248 (1984).

<sup>12</sup> See, Cal. Lab. Code Ann. §1102.5 (West Supp. 1989); Cal. Gov't. Code §§10540-10551 (West 1980); Conn. Gen. Stat. Ann. §31-51m (West Supp. 1988); La. Rev. Stat. Ann. §30:2027 (West 1987); Me. Rev. Stat. Ann. tit. 26 §§831-40 (1988); Minn. Stat. Ann. §§ 181.931-.935 (West Supp. 1989); Mont. Code Ann. §§39-2-901 to -914 (1987); N.J. Stat. Ann. §§34:19-1 to -8 (West 1988); N.Y. Lab. Law §740 (McKinney 1988); Pa. Stat. Ann. tit. 43, §§1421-28 (Purdon Supp. 1988).

In particular, Section 210 has a Draconian 30-day statute of limitations, which the Secretary of Labor interprets harshly.<sup>13</sup> Section 210 does not provide for punitive or exemplary damages, does not involve a jury, does not allow for full discovery rights, and is given limited review by a Court of Appeals. The advantages of the statute to whistleblowers is its purported speedy and inexpensive remedy.<sup>14</sup>

Furthermore, Congress did not create any new, special administrative body that would support an inference that 42 U.S.C. §5851 was intended to be the exclusive means of enforcing the ERA. Instead, the

---

<sup>13</sup> This is nowhere more true than in the present case, where the Petitioner filed a complaint with the Department of Labor, went through a hearing and received a favorable judgment, only to have that result thrown out by the Secretary of Labor on the basis of an untimely filed complaint. The Petitioner had filed a complaint after her layoff, as opposed to her transfer by the company which did not affect her salary or benefits. In our view, the Petitioner relied, to her detriment, upon the good faith representations of the company to find her other work. By finding that such employees must file a complaint within thirty days of any act that could possibly be construed as discriminatory encourages, even necessitates, a flood of premature complaints.

<sup>14</sup> The alleged advantage of expedited judgments is overstated. Most complaints that survive initial actions to dismiss take far more than the statutorily mandated 90 days to resolve. A study of timeliness for Labor Department litigation in the 275 whistleblower cases between fiscal years 1982 and 1989 revealed that the agency failed to meet the statutory deadline for resolving such cases in a large percentage of cases, sometimes by as much as 800 days and more. See, 134 Cong. Rec. S1447 (daily ed. Feb. 25, 1988)(Testimony of the Government Accountability Project at 103, 109).

agency designated to enforce Section 210, the Department of Labor, also resolves a myriad of other labor disputes and was in existence well before the passage of Section 210.

Consequently, no interference with the nuclear regulatory scheme is evident from permitting states to exercise their traditional right to regulate the employer-employee relationship. To rise to the level of completely eliminating a state's right to regulate the employment relationship, the federal regulation would have to be truly pervasive. *Bush v. Lucas*, 462 U.S. 367 (1983). Even where comprehensive legislative schemes have been put in place to regulate labor and management relations, state tort actions against the employer for damages arising out of the employment relationship have been permitted. *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 108 S.Ct. 1877 (1988).

### C. Congress Did Not Intend to Shrink Whistleblower Remedies

The central issue for whistleblowers is whether in passing Section 210, Congress intended to encourage disclosures by expanding protections, or discourage dissent by shrinking employee rights. There is simply not a scintilla of evidence -- only speculation -- that Congress intended Section 210 to be substitutive, not additive. By determining that a comprehensive federal scheme existed in 42 U.S.C. §5851, thereby barring any state claim lest frustration of the federal policy occur, the court below failed to consider the fundamental



purpose of these sections -- further protection of the employee against retaliatory discrimination. The legislative history of Section 210 demonstrates the clear and manifest intent of Congress to increase employee protection. Senate Report No. 95-848, 95th Cong., 2d Sess. 29, reprinted in 1978 *U.S. Code Cong. & Ad. News* 7303. Further, the Fourth Circuit conceded this fact. *English v. GE*, 683 F. Supp. 1006, 1012-13 (E.D.N.C. 1988) *aff'd per curiam*, 871 F.2d 22 (4th Cir. 1989).

It would hardly enhance employee protection for Congress to eliminate state-based rights under tort law providing for jury trials and punitive damages. As Chief Justice Rehnquist has written, our Founding Fathers considered the right to jury trial "an important bulwark against tyranny and corruption." *Parklane Hosiery v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting). Since the right to a jury trial is a cornerstone of common law and state constitutions, Congress would not have lightly abolished American citizens' rights to jury trials in fifty states without debate, *sub silentio*.<sup>15</sup>

Neither would Congress have lightly abolished the right to punitive damages in appropriate cases. In this case, two different legislatures exercised their discretion

---

<sup>15</sup> The tort of intentional infliction of emotional distress is a question of state and not federal law. Further, it is clear that the tort of wrongful discharge is an area equally subject to state regulation. *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877, 100 L.Ed. 410 (1988) (wrongful discharge is a state tort remedy, within the traditional police powers of the states).

not to foreclose plaintiffs' rights to punitive damages (as well as to jury trials): the U.S. Congress and the North Carolina state legislature. The United States Congress did not exercise its power of federal preemption. The North Carolina legislature and its state courts have likewise declined to adopt an exclusive remedy rule in cases of federal administrative remedies. Yet the courts below, acting as a "super-legislature," abused their discretion to do what the two legislatures declined to do.

The state of North Carolina had the chance to abolish the application of its tort of intentional infliction of emotional distress to whistleblowers protected by Section 210 and other federal laws. North Carolina has done nothing to diminish these rights to tort actions and jury trials, although it was within its sovereign powers.<sup>16</sup> North Carolina has a powerfully compelling state interest in allowing for jury trials and punitive damages. As General Electric has demonstrated in its

---

<sup>16</sup> Other states have exercised their discretion to adopt exclusive remedy rules; see e.g., *Walsh v. Consolidated Freightways* 278 Or. 347, 351-53, 563 P.2d 1205, 1208-09 (1977) (no tort because OSHA remedies adequate to protect interests of employee and society); *Corbin v. Sinclair Mktg.*, 684 P.2d 265, 267 (Colo. Ct. App. 1984) (Colorado public policy exception to "employment at will" does not apply to employees with statutory remedy); *Gybz v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985) (aggrieved party limited to statutory remedy); *Salazar v. Furr's, Inc.*, 629 F. Supp. 1403, 1409 (D.N.M. 1986) (no claim for relief for wrongful discharge where another remedy provided by statute); *Allen v. Safeway Stores*, 699 P.2d 277, 284 (Wyo. 1985) (no need for court-imposed tort action if another remedy exists).



brief, the availability of punitive damages can be a powerful incentive to comply with the law, and a useful tool for courts to accomplish the same goal. The principle was first recognized in the time of George III, when punitive damages were allowed to punish abuse of authority. *Huckle v Money*, 95 Eng.Rep. (K.B.1782).

Juries are permitted to award punitive damages based on the defendant's culpable state of mind or abuse of power. Dobbs, *Remedies* (1973) at 204-6. In North Carolina, punitive damages are allowed in cases of "malicious, wanton and reckless" actions and "reckless and criminal indifference to [plaintiff's] rights." *Cotton v. Fisheries Products Co.*, 181 N.C. 151, 106 S.E. 487 (1921).

The district court reasoned that since two other whistleblower protection laws (15 U.S.C. §2622(b)(2)(B) and 42 U.S.C. §300j-9(i)(2)(B)(ii)) contained punitive damage award provisions, and therefore Congress "reached an informed judgment" that in "no circumstances should a nuclear whistleblower receive punitive damages." *English v. GE*, 683 F.Supp. 1006 (E.D.N.C. 1988). This ignores the reality that development of whistleblower legislation by Congress has been a piecemeal project, with particular industries or substantive areas of concern addressed *ad hoc*, one at a time. Congress has been inconsistent in adopting whistleblower legislation. The consultant to the Administrative Conference of the United States wrote:

Over a dozen federal laws attempt to protect whistleblowers from retaliation in wide areas of private sector activity

where health and safety are at stake. These laws, which protect both public and workplace health and safety interests . . . have created a crazy quilt of investigative, adjudicatory and review responsibilities . . . . These discrepancies reflect vagaries of the legislative process -- legislation has addressed various industries on an incremental or piecemeal basis over time ...

Eugene R. Fidell, "Federal Protection of Private Sector Health and Safety Whistleblowers," 2 *Administrative Law Journal* 1, 2,4 (1988).

The Administrative Conference of the United States in reviewing federal whistleblower protection concluded that "this lack of uniformity does not appear to be reasoned, but most likely reflects the incremental enactment of the various statutes over a period of years." 1 C.F.R. § 305.87-2.<sup>17</sup>

---

<sup>17</sup> As the advocates of the ABA resolution on whistleblower protection argued to the ABA House of Delegates:

Current federal law, a series of scattered provisions, is confused and inconsistent; this happened largely because Congress adopted the employee protection statutes one at a time. These procedural complexities would be eliminated with passage of the omnibus bills now proposed, which follow recommendations made by the Administrative Conference of the United States (ACUS).

Congress' omission of punitive damage awards in Section 210 does not indicate any intent to preempt punitive damages under state law, only an inconsistency among whistleblower statutes fraught with inconsistencies, universally criticized by commentators and the focus of current legislative initiative. A minor inconsistency is hardly the stuff of which federal preemption is hewn, particularly when preemption would adversely affect rights of citizens who happen to be nuclear workers in fifty states.

Several pieces of legislation have been introduced in recent years marking a concerted effort by Congress to enhance the protections afforded to employees in the private sector when they report on matters within their employment that may affect public health and safety. These initiatives are in large part the result of recommendations of the Administrative Conference of the United States (ACUS) and the recognition that employees in important industries such as aviation, food processing, nuclear weapons, health care, and others have no minimum federal protection in place to protect them when they seek to report problems within those industries.

One of the first bills designed to address the issue of across the board minimum federal protection for all private sector employees was the Uniform Health and Safety Whistleblowers Protection Act. Introduced as

---

<sup>17</sup>(...continued)

Report and Recommendation to the ABA House of Delegates accompanying Resolution 125, *supra*, footnote 8 at 3.

S.2095, the overall purpose of the bill was described by Senator Howard Metzenbaum, (D.Ohio):

Private sector employees should feel free to report illegal or improper activities that endanger the public health or safety without fear of personal reprisal. It is a fundamental principle of good Government to encourage citizens to report illegal activities to the proper authorities. Especially when public health and safety is at stake, individuals who are willing to report unlawful, hazardous practices to avert a disaster should be honored as heroes. Instead, in too many cases, their reward is to be fired, harassed, demoted, or blacklisted by their employers.

134 Cong. Rec. S1447 (daily ed. Feb. 25, 1988)(statement of Sen. Metzenbaum). Notably, S.2095 sought also to clarify the very issue being addressed by this Court today. In Section 8(a) drafters of the bill emphasized that the remedies provided would not preempt state law remedies. Instead, the remedies provided would seek to supplement state-based rights and remedies.

Most recently, bills have been introduced in both Houses of Congress again designed to provide wide spread minimum protections for private sector employees. This proposed legislation (S.436 introduced in the Senate and H.R. 3368 introduced in the House) is entitled the Employee Health and Safety Whistleblower Protection Act. In his statement before the Senate Subcommittee on Labor, Senator Charles Grassley, (R.Iowa) a co-sponsor of S.436 stated:



Mr. Chairman, as you know....during my service in the Senate I have championed the rights of Whistleblowers who disclose waste and fraud in the Federal Government. My work has led me to conclude that whistleblowers perform a valuable public service. Without their disclosures, we would not begin to know where to find waste and inefficiency.

Whistleblowers face enormous obstacles in their efforts to expose waste and correct that wrongdoing. Our system rewards these employees with the most unfair prizes- like discharge, demotion, and unwanted transfers. They risk their careers as well as reputations in the interest of honest Government, and they do so reluctantly.

\* \* \* \* \*

So, Mr. Chairman, in summary, the employees who bring health and safety violations to public light deserve our thanks. At a minimum we need to ensure their careers are secure. This bill sends an important message to employers, employees, and the American public at large: Violations of health and safety standards, like Federal waste and fraud, will not and cannot be tolerated. And we need to rely on courageous employees to help us make sure that Federal standards are met.

Testimony of Senator Charles Grassley before the

Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 101st Congress, March 7, 1989, pp. 37-39.

Again, S.436 and S.2095 attempt to rectify the unwarranted confusion in the courts on the issue of federal preemption by specifically indicating that the bills will supplement not supplant state based rights and remedies. See, Section 8(b) of S.436 and H.R. 3368.

"All laws should receive a sensible construction," avoiding "injustice, oppression, or an absurd consequence." *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1869). With neither legislative history nor statutory language hinting at any intent to abolish either the process of jury trials, or any state law remedies, it would be "absurd" to assume that Congress would have intended such "injustice [and] oppression." *Id.* Jury trials and punitive damages vindicate individual rights and are important safeguards of the liberty of the individual. "The liberty of the individual must be scrupulously protected .... no rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences." *United States v. Brown*, 333 U.S. 18, 27 (1947). Denying employees their right to jury trials in state court actions is "not within [the law's] spirit, nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

In sum, the groundswell for whistleblower protection gained momentum once Congress took affirmative steps to shield employees in the mine industry in 1968. See, M. P. Glazer & P. M. Glazer, *The Whistleblowers* --



*Exposing Corruption in Government and Industry* (1989) at 65-66. In its infancy, federal whistleblower protection naturally developed slowly and cautiously. It has developed to the point where generic legislation to protect all private sector safety, health and environmental whistleblowers is pending in Congress. S. 436; H.R. 3368 (101st Cong., 1st Sess.). Those bills explicitly provide that there is no federal preemption of state remedies, making clear Congress did not intend to wipe out state law liability.

#### D. Case Law Supports a Finding of No Preemption

This analysis is consistent with the prevailing trend of case law deciding whether federal whistleblower statutes preempt state remedies. State and federal remedies are complementary, not conflicting. For instance, in the FMSHA, 30 U.S.C. §815(c)(1988), two courts have addressed the issue. In *Wiggins v. Eastern Associated Coal Co.*, 357 S.E.2d 745 (W.Va.1987) the West Virginia Supreme Court found that the whistleblower protection codified in the statute was inadequate as a matter of law, and therefore did not preempt state remedies. *But see, Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984)(FMSHA was adequate, so preemption found).

One court has held the Clean Air Act (CAA) whistleblower provision, 42 U.S.C. §7622 (1988) does not preempt state tort suits. *Phipps v. Clark Oil and Refinery Co.*, 396 N.W.2d 588 (Minn.Ct.App. 1986) *aff'd* 408 N.W.2d 569 (Minn. 1987). In *Phipps*, the CAA whistleblower protection provision was found not to

preempt state law claims in that state law simply advanced the declared Congressional purpose of protecting employees from retaliatory discharges.

Section 210 cases reach similar holdings. In *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N.E.2d 372, 376 (Ill. 1985) *cert. denied*, 475 U.S. 1122 (1986), the court held that there was no preemption because Congress in enacting Section 210, did not intend such a result. *Also see, Gaballah v. PG&E*, 711 F.Supp. 988 (N.D. Cal 1989), finding Section 210 does not bar a state court action based on state law, as "[t]here is no apparent reason why Congress should have wanted to bar persons who complained about safety violations from a jury trial and the recovery of punitive damages but not to bar persons who suffered injuries from those violations." 711 F. Supp. at 990. *Accord, Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144, 1151 (1st Cir. 1989)("no good reason for barring state remedies to whistleblowers" but "allowing punitive damages under state law" to those injured in nuclear accidents that might not have occurred if whistleblower's complaints had been investigated"). *But see, Chrisman v. Phillips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140 (1988).

Clearly Section 210 is an elective remedy afforded by Congress and not meant to be all-encompassing. *Stokes v. Bechtel N. Am. Power Corp.*, 614 F. Supp. 732,744 (N.D. Cal. 1985)(Section 210 supplements state protection for nuclear whistleblowers).

The Department of Labor is the agency with

expertise in Section 210 complaints; the Department of Labor has also held that the Section 210 remedy is not an exclusive remedy, and that there is no federal preemption of state law tort suits. This is evidenced by the Secretary of Labor's ruling that dismissal of a Section 210 complaint should be without prejudice, so that such a dismissal will not preclude a state court action. *See, e.g., Nolder v. Ramond Kaiser Engineers, Inc.*, No. 84-ERA-5 (D.O.L., June 28, 1985).

This Court defers to the reasonable interpretation of the agency to which Congress has delegated authority. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984) (considerable weight should be accorded to an executive department's construction of a statute it is entrusted to administer.) *See also, United States v. Turkette*, 452 U.S. 576, 580 (1980); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *McLaren v. Fleischer*, 256 U.S. 477, 480 (1921). As this Court held in *Udall v. Talmann*:

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

380 U.S. at 16 (1965). *Amicus* respectfully asks this Court to give such deference to the view of the Solicitor of the Department of Labor, who has filed a brief in support of the Petitioner, Vera English.

## CONCLUSION

If Vera English had been subjected to the type of outrageous behavior alleged in her complaint in a non-nuclear portion of GE's Wilmington, North Carolina plant, there would be no question but that she could proceed in state court to vindicate her rights. As Petitioner aptly states in her brief, intentional infliction of emotional distress is a matter properly regulated by the state in order to preserve civilized relations among its citizens, and to punish wrongdoers. It would indeed be ironic if, simply by virtue of an employee performing the public service of reporting unsafe nuclear conditions, that employee were deprived of her rights. It would not take long for that type of interpretation to defeat Congress' intent of encouraging disclosures.

Moreover, the rights and interests of a state in protecting the economic interests of its citizens will be better served by allowing it to encourage reporting of safety problems through maintaining remedial protections. It is up to the Congress, not the courts, to "rethink the division of regulatory authority" and to



decide whether state remedies provided for employees covered by the ERA "undercut[s] a federal objective." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, 223 (1983).

Respectfully submitted,

Louis A. Clark  
Counsel of Record

Of Counsel:

Thomas E. Carpenter  
Edward A. Slavin, Jr.  
Richard Condit  
Sandra Peaches



(8)  
No. 89-152

Supreme Court, U.S.  
FILED

MAR 7 1990

JOSEPH E. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1989

---

VERA ENGLISH,

*Petitioner,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

---

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

---

**BRIEF OF THE PLAINTIFF EMPLOYMENT  
LAWYERS ASSOCIATION AS AMICUS CURIAE**

---

J. Michael McGuinness \*  
Lisa A. Parlagreco  
Counsel for Amicus  
P.O. Box 5939, JFK Station  
Boston, MA 02114  
(617) 742-1900

Paul Tobias  
Of Counsel  
911 Mercantile Library Bldg.  
414 Walnut Street  
Cincinnati, OH 45202  
(513) 241-8137

\* *Counsel of Record*

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii
Interest of the Amicus Curiae .....	1
Statement of the Case .....	1
Issue .....	1
Summary of Argument .....	1
Argument .....	1
 I. The Energy Reorganization Act, 42 U.S.C. 5851. Does Not Preempt A State Tort Claim Arising Out Of An Unlawful Employee Discharge For Making Safety Complaints .....	       2
 II. The Decision Below Preempting Petitioner's State Law Claim Frustrates The Independence Of North Carolina Jurisprudence And The North Carolina Constitution .....	       4
 A. North Carolina's Tradition Of Affording Protection Against Abusive Employee Discharge Practices Militates Against Preemption .....	       4
 B. North Carolina's Recognition Of Intentional Infliction of Emotional Distress Militates Against Preemption .....	       6

C. Intentional Infliction Broadly Applies To A Comprehensive Range Of Abusive Employer Misconduct. ....	7
D. North Carolina's Independent Judiciary Affords An Essential Forum For Employee Protection. ....	8

## TABLE OF AUTHORITIES

Cases:	Page
<i>Belknap v. Hale</i> , 463 U.S. 491 (1983) .....	3
<i>Brown v. Burlington Ind.</i> , 378 S.E. 2d 232 (N.C. App. 1989) .....	7
<i>California v. ARC America Corp.</i> , 109 S. Ct. 1661 (1989) .....	3,4
<i>City of Burbank v. Lockhead</i> , 411 U.S. 624 (1973) .....	2
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985) .....	4
<i>Collins v. Time</i> , 549 F. Supp. 770 (N.D. Ala. 1982) .....	7
<i>Coman v. Thomas Mfg. Co.</i> , 381 S.E. 2d 445 (N.C. 1989) .....	5
<i>Cooper v. California</i> , 386 U.S. 58, 62 (1967) .....	8
<i>Davis v. U.S. Steel</i> , 779 F. 2d (4th Cir. 1985) .....	7
<i>Decanas v. Bica</i> , 424 U.S. 351, 356 (1976) .....	3
<i>Dixon v. Stuart</i> , 354 S.E. 2d 757 (N.C. App. 1987) .....	7
<i>Farmer v. United Brotherhood</i> , 430 U.S. 290 (1977) .....	3
<i>Florida Lime &amp; Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963) .....	2
<i>Fort Halifax Packing v. Coyne</i> , 482 U.S. 1 (1987) .....	2
<i>Gaballah v. PG&amp;E</i> , 711 F. Supp. 988 (N.D. Cal. 1989) ...	2
<i>Geist v. Martin</i> , 675 F. 2d 859 (7th Cir. 1982) .....	7



<i>Greenlee v. Southern Railway</i> , 30 S.E. 115 (N.C. 1898) . . .	5
<i>Hall v. May Dept. Store</i> , 637 P.2d 126 (Ore. 1981) . . . . .	7
<i>Haskins v. Royster</i> , 70 N.C. 601 (1874) . . . . .	5
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1942) . . . . .	2
<i>Hogan v. Forsyth Country Club</i> , 340 S.E. 2d 141 (N.C. App. 1986), <i>disc. rev. denied</i> , 346 S.E. 2d 141 (1986) . . . . .	6
<i>Holien v. Sears, Roebuck &amp; Co.</i> , 689 P.2d 1292 (Ore. 1984) . . . . .	3
<i>Holmes v. Oxford Chemicals</i> , 672 F. 2d 854 (11th Cir. 1982) . . . . .	7
<i>Johnson v. Railway Express</i> , 421 U.S. 454 (1975) . . . . .	6
<i>Kelly v. Schlumberger</i> , 849 F. 2d 41 (1st Cir. 1988) . . . . .	7
<i>Kirby v. Jules Chain Stores Corp.</i> , 188 S.E. 625 (N.C. 1936) . . . . .	6
<i>Lingle v. Norge Div. of Magic Chief</i> , 100, L. Ed. 2d 410 (1988) . . . . .	2,5
<i>Linn v. Plant Guard Workers</i> , 383 U.S. 53, 63 (1966) . . . . .	3
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981) . . . . .	2
<i>Milton v. Ill. Bell.</i> , 427 N.E. 2d 829 (Ill. App. 1981) . . . . .	7
<i>Muratore v. MLS Scotia Prince</i> , 656 F. Supp. 471 (D. Me. 1987), <i>aff'd in part</i> , 845 F. 2d 347 (1st Cir. 1988) . . . . .	8
<i>Nader v. Allegheny Airlines</i> , 426 U.S. 290 (1976) . . . . .	3
<i>New York Tel. Co. v. New York</i> , 440 U.S. 519 (1979) . . . . .	3

<i>Norris v. Lumberman's Mutual Casualty Co.</i> , 881 F. 2d 1144 (1st Cir. 1989) . . . . .	2
<i>Oregon v. Hass</i> , 420 U.S. 714 (1975) . . . . .	8
<i>Pratt v. Brown</i> , 855 F.2d 1225 (6th Cir. 1988) . . . . .	7
<i>Pruneyard Shopping Center v. Robbins</i> , 447 U.S. 74 (1981) . . . . .	8
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) . . . . .	2
<i>Rogers v. Loews</i> , 526 F. Supp. 523 (D.D.C. 1981) . . . . .	7
<i>Sides v. Duke Hospital</i> , 328 S.E. 2d 818 (N.C. App. 1985), <i>dis. rev. denied</i> , 333 S.E. 2d 490 (1985) . . . . .	5
<i>Silkwood v. Kerr McGee</i> , 464 U.S. 238 (1984) . . . . .	8
<i>Southwest Forest v. Sutton</i> , 868 F. 2d 352 (10th Cir. 1989) . . . . .	7
<i>Treants Enterprises v. Onslow County</i> , 350 S.E. 2a 365 (N.C. App.), 360 S.E. 2d 783 (1987) . . . . .	8
<i>Trought v. Richardson</i> , 338 S.E. 2d 617 (N.C. App. 1986) . . . . .	6
<i>West v. King's Dept. Store</i> , 365 S.E. 2d 621 (N.C. 1988) . . . . .	6
<i>Wheeler v. Caterpillar Tractor Co.</i> , 485 N.E. 2d 372 (Ill. 1985), <i>cert. denied</i> , 475 U.S. 1122 (1986) . . . . .	2
<i>Williams v. Hillhaven Corp.</i> , 370 S.E. 2d 423 (N.C. App. 1988) . . . . .	5
<i>Woodruff v. Miller</i> , 387 S.E. 2d 176 (N.C. App. 1983) . . . . .	8

### Legislative History

- S. Rep. No. 848, 95th Cong., 2nd Sess. (1978) reprinted in  
1978 U.S. Code Cong. & Admin. News 7303 . . . . . 2

### Constitutional Provisions

- Art. I, Sec. I, North Carolina Constitution . . . . . 8  
Art. I, Sec. 18, North Carolina Constitution . . . . . 8

### Statutes

- 42 U.S.C. 5851 . . . . . 3  
N.C. GEN.STAT. 126-84 . . . . . 6

### Other Authorities

- Larson & Barowsky, *Unjust Dismissal* (1986) . . . . . 7  
  
McGuinness, *The Doctrine of Wrongful Discharge In North Carolina: The Confusing Path From Sides To Guy and The Need for Reform*, 10 Campbell L. Rev. 217 (1988) . . . . . 3,5  
  
McGuinness, *Contemporary Applications of Intentional Infliction of Emotional Distress*, Journal of the North Carolina Academy of Trial Lawyers, 20 (Vol. 21, No. 1, 1989) . . . . . 6  
  
Perritt, *Employee Dismissal Law and Practice* (2nd ed. 1987) . . . . . 7  
  
Posner, *The Economic Analysis of Law* (3rd ed. 1986) . . . . . 5

- Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939) . . . . . 6  
  
Spence, *With Justice For None* (1989) . . . . . 4  
  
Stone, *The Common Law In The United States*, 50 Harv. L. Rev. 4 (1936) . . . . . 5  
  
Sutherland, *Statutory Construction* (4th ed. 1984) . . . . . 3

## INTEREST OF THE AMICUS CURIAE

Plaintiff Employment Lawyers Association (hereafter PELA) is a non-profit organization consisting of over 800 lawyers in forty-nine states. PELA's members concentrate in the representation of individual employees in employment and labor matters. Members of PELA are active in litigating abusive employee discharge claims like that of Petitioner throughout the nation. PELA is vitally interested in the outcome of this critical case. Amicus has obtained the consent of both the Petitioner and Respondent to file this brief, and has filed letters indicating consent with the clerk's office.

## STATEMENT OF THE CASE

PELA adopts the statement of the case as presented by Petitioner.

## ISSUE

Whether The Energy Reorganization Act, 42 U.S.C. 5851, Which Provides A Limited Remedy For Employees Who Suffer Reprisal For Making Safety Complaints (Whistleblowing), Preempts An Employee's State Law Tort Action?

## SUMMARY OF ARGUMENT

There is no Congressional intent suggesting that 42 U.S.C. 5851 was designed to preempt all preexisting state tort law claims available to redress various forms of abusive employer misconduct. North Carolina and other states have long provided an independent judiciary affording employees traditional remedies and constitutionally protected rights of trial by jury. Absent clear Congressional intent to preempt state law claims, a federal statute may not eviscerate preexisting state remedies for intentionally inflicted emotional distress. Here, the Fourth Circuit's approach preempting such a traditional state tort remedy contravenes basic principles of American federalism.

## I. The Energy Reorganization Act, 42 U.S.C. 5851, Does Not Preempt a State Tort Claim Arising Out of an Unlawful Employee Discharge for Making Safety Complaints.

Absent an express Congressional intent to preempt state law, preemption occurs when "compliance with both is a physical impossibility . . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1942). The analysis in *Norris v. Lumberman's Mutual Casualty Co.*, 881 F.2d 1144, 1150 (1st Cir. 1989) demonstrates that neither the statutory language nor the legislative history of section 5851 indicates any Congressional intent to prohibit state common law remedies. *Lingle v. Norge Division of Magic Chef*, 108 S. Ct. 1877, 1885 (1988) rejected the analysis employed by the lower court here favoring preemption. *Accord Fort Halifax Packing Company v. Coyne*, 482 U.S. 1 (1987) (State statute requiring severance pay not preempted by NLRA or ERISA).

Preemption analysis begins with the settled concept that all presumptions operate against preemption. *E.g. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Preemption analysis provides that one "starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). As Chief Justice Rehnquist has explained, "unless the requisite preemption intent is abundantly clear, we should hesitate to invalidate state and local legislation..." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J. dissenting). The Fourth Circuit's approach in the case *sub judice* overlooks these strong presumptions and the legislative history of section 5851. *See* S. Rep. No. 848, 95th Cong., 2nd Sess. (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 7303; *Gaballah v. PG&E*, 711 F. Supp. 988, 990 (N.D. Cal. 1989); *Wheeler v. Caterpillar Tractor Co.*, 485 N.E. 2d 372 (Ill. 1985), cert. denied, 475 U.S. 1122 (1986). Here, there is no such abundantly clear evidence that Congress intended to preempt the entire field of all state remedies for emotional harm and other tortious injuries to workers who suffer reprisal for making safety complaints.



These fundamental principles of deference to state law have been particularly strong where the state law involved is common law rather than statutory law. In *Nader v. Allegheny Airlines*, 426 U.S. 290, 301 (1976), this Court rejected the defendant's preemption argument, reaffirming that common law rights are not abrogated by a subsequent federal statute. This Court has long preserved states' rights to enforce common law remedies, especially in the labor context. E.g., *Belknap v. Hale*, 463 U.S. 491, 509 (1983) (state fraud and contract claims not preempted by the National Labor Relations Act); *Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966) ("state remedies have been designed to compensate the victim...").

This Court's holding and rationale in *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977) is controlling. There, this Court held that the National Labor Relations Act did not preempt a tort action for intentional infliction under California law. Absent express legislative intent to preempt a specific area by statute, statutory and common law remedies are cumulative. See *New York Tel. Co. v. New State Dept. of Labor*, 440 U.S. 519 (1979); *Holien v. Sears, Roebuck & Co.*, 689 P.2d 1292 (Ore. 1984); J. Sutherland, *Statutory Construction*, section 50.05 at 441 (4th ed. 1984). Therefore, the long established North Carolina common law doctrines of intentional infliction of emotional distress and wrongful discharge are similarly not abrogated by the subsequently enacted limited remedy associated with 42 U.S.C. 5851.

Congress and the states have enacted overlapping protections against wrongful discharge and related injuries thus creating layers of essential protection. See McGuinness, *The Doctrine of Wrongful Discharge In North Carolina: The Confusing Path From Sides to Guy and the Need for Reform*, 10 Campbell L. Rev. 217, 219 n.4 (1988) (summarizing federal statutory and state common law theories of recovery). There is no actual or apparent conflict between the essential purposes of North Carolina's state tort law and section 5851 and thus no obstacle for compliance with both. Moreover, "ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989). In *Decenas v. Bica*, 424 U.S. 351, 356 (1976), this Court recognized that "states possess broad authority...to regulate the employment relationship to protect workers within the State."

The Fourth Circuit's approach here frustrates the bedrock principles of federalism.

This Court has repeatedly "recognized the severity of depriving a person of the means of livelihood." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985). Justice Marshall's concurrence in *Loudermill* also underscored the "traumatic effect of a wrongful discharge on a working person" and how "so very much is at stake" in employment litigation. *Id.* at 551. Too much is at stake in state employment litigation nationally for section 5851 to wipe out centuries of settled state common law protection absent clear Congressional intent to displace these seminal laws. The Fourth Circuit's approach in the case *sub judice* erroneously construes Congressional intent and frustrates settled state law protection for the common worker. As one commentator explained:

In the workplace, we wage our most important battles, with poor weapons and few rights, and then, like the slaves of old, many are irretrievably trapped...The American worker...lives with degradation and helplessness. G. Spence, *With Justice For None* 162 (1989).

## II. The Decision Below Preempting Petitioner's State Law Claim Frustrates The Independence Of North Carolina Jurisprudence And The North Carolina Constitution.

### A. North Carolina's Tradition Of Affording Protection Against Abusive Employee Discharge Militates Against Preemption.

Are the states free to provide greater or additional remedies for abused workers than the limited remedies provided by Congress through 42 U.S.C. 5851? *California v. ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989) and its antecedents provide that states are free to "impose liability over and above that authorized by federal law." The foregoing preemption analysis must be applied against

the backdrop of North Carolina's historic tradition of state law protection for the abused worker.

North Carolina has a rich and proud heritage of protecting employees from abusive employer misconduct through various common law claims. North Carolina was among the first states in the nation to recognize a bad faith exception to the employment at will doctrine. In 1874, in *Haskins v. Royster*, 70 N.C. 601 (N.C. 1874), the North Carolina Supreme Court held that an employer may not discharge an employee in bad faith. See McGuinness, *The Doctrine of Wrongful Discharge In North Carolina: The Confusing Path From Sides To Guy and The Need For Reform*, 10 Campbell L. Rev. 217, 222-23 (1988). In the nineteenth century, the North Carolina Supreme Court observed that "the courts will be very delect in their duty if they do not force justice in favor of employees as well as the public." *Greenlee v. Southern Railway*, 30 S.E. 115, 115 (N.C. 1898).

In *Coman v. Thomas Manufacturing Company*, 381 S.E. 2d 445 (N.C. 1989), the North Carolina Supreme Court reaffirmed *Haskins*: "bad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships." *Id.* at 448 and n.3. Judge Richard Posner of the Seventh Circuit similarly supports a state law cause of action for wrongful discharge. "A common law tort of unjust termination [is] sensibly applied in cases where a worker is fired for exercising a legal right..." Posner, *The Economic Analysis of Law* 307 (3rd ed. 1986). See *Lingle v. Norge Div. of Magic Chief, Inc.*, 108 S. Ct. 1877, 1881-82 (1988) (discussing state wrongful discharge claims in the context of preemption).

Between North Carolina's historic pronouncements in *Haskins* and *Coman*, the North Carolina Court of Appeals employed its common law tradition in recognizing various common law theories to enable workers to combat abusive employer conduct. E.g., *Sides v. Duke Hospital*, 328 S.E. 2d 818, *disc. rev. denied*, 333 S.E. 2d 490 (N.C. 1985) (public policy exception to the at will doctrine); *Williams v. Hillhaven Corp.*, 370 S.E. 2d 423 (N.C. App. 1988) (same). In *Sides*, the court relied upon North Carolina's rich common law history: "with social change comes the imperative demand that law shall satisfy the needs which change has created...law shall at once have continuity with the past and adaptability to the future." 328 S.E. 2d at 827, quoting Stone, *The Common Law In The United States*, 50 Harv. L. Rev. 4, 11 (1936).

In addition to the traditional bad faith exception and the public policy exception, North Carolina also recognizes implied contract claims for discharged employees. *Trought v. Richardson*, 338 S.E. 2d 617, 619-20 (N.C. App. 1986) (bilaterally executed employment manual binding). In addition to the numerous federal statutory and constitutional protections, the North Carolina General Assembly has afforded protection for whistleblowers. See N.C. Gen. Stat. 126-84. The Fourth Circuit's decision eviscerates the fabric of this compelling state protection of basic human rights.

#### B. North Carolina's Recognition Of Intentional Infliction Of Emotional Distress Militates Against Preemption.

In addition to the traditional wrongful discharge theories, North Carolina has also long recognized the tort of intentional infliction of emotional distress. See *West v. Kings Department Store, Inc.*, 365 S.E. 2d 621 (N.C. 1988); McGuinness, *Contemporary Applications of Intentional Infliction of Emotional Distress*, Journal of The North Carolina Academy of Trial Lawyers 20 (Vol. 21, No. 1, 1989). In *Kirby v. Jules Chain Stores Corp.*, 188 S.E. 625 (N.C. 1936), the North Carolina Supreme Court initially recognized a form of intentional infliction of emotional distress as an independent tort. See generally Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939).

Contemporary North Carolina cases have also applied the intentional infliction tort to various forms of abusive employee discharge. In *Hogan v. Forsyth County Country Club*, 340 S.E. 2d 116, 123 (N.C. App. 1986), *disc. rev. denied*, 346 S.E. 2d 141 (1986), the court recognized intentional infliction in an employee discharge case premised upon sexual harassment. In spite of the comprehensive coverage and application of Title VII of the Civil Rights Act of 1964, North Carolina recognized the protection of the intentional infliction tort and the essential "remedial recourse through our North Carolina legal system." *Id.* See *Johnson v. Railway Express*, 421 U.S. 454, 459 (1975) (despite the comprehensive nature of Title VII, "the aggrieved individual is clearly not deprived of other remedies he possesses and is not limited to Title VII in his search for relief"). Certainly, if the pervasive Title VII scheme does not preempt the field, the narrow provision in section 5851 is not preemptive.



In *Dixon v. Stuart*, 354 S.E. 2d 757 (N.C. App. 1987), the court reversed the trial court's dismissal of the employee's intentional infliction claim where the employee alleged a pattern of ridicule and egregious harassment in the workplace. See *Brown v. Burlington Industries* 378 S.E. 2d 232 (N.C. App. 1989) (intentional infliction verdict of \$60,000.00 affirmed in employee discharge case premised upon sex harassment). These compelling North Carolina cases are in accord with strong national trends underscoring traditional state law intentional infliction claims. E.g. *Davis v. U.S. Steel*, 779 F. 2d 209 (4th Cir. 1985) (sex harassment); *Pratt v. Brown*, 855 F. 2d 1225 (6th Cir. 1988); *Rogers v. Loews L'Enfant Plaza*, 526 F. Supp. 523 (D.D.C. 1981); H. Perritt, *Employee Dismissal Law and Practice*, section 5.23 (2nd ed. 1987); Larson & Barowsky, *Unjust Dismissal*, section 4.03 (1986).

C. Intentional Infliction Broadly Applies To A Comprehensive Range Of Abusive Employer Misconduct.

In addition to the foregoing employee discharge cases grounded in intentional infliction theories, the intentional infliction tort has been employed in various other employment contexts. E.g., *Holmes v. Oxford Chemicals*, 672 F. 2d 854 (11th Cir. 1982) (intentional infliction verdict upheld where the employer arbitrarily reduced employee's monthly disability payment); *Kelly v. Schlumberger Tech.*, 849 F. 2d 41 (1st Cir. 1988) (intentional infliction claim recognized for employer misconduct in drug testing program; \$125,000.00 verdict affirmed); *Southwest Forest Ind. v. Sutton*, 868 F. 2d 352 (10th Cir. 1989) (intentional infliction verdict of \$1,250,000.00 upheld for abusive discharge); *Collins v. General Time Corp.*, 549 F. Supp. 770 (N.D. Ala. 1982) (threats of discharge may give rise to intentional infliction); *Geist v. Martin*, 675 F. 2d 859 (7th Cir. 1982) (intentional infliction for termination of plaintiff's husband as agent of defendant); *Hall v. May Dept. Stores*, 637 P. 2d 126 (Ore. 1981) (intentional infliction claim supported for employee harassment in investigating cash shortages). In *Milton v. Ill. Bell Tel.*, 427 N.E. 2d 829 (Ill. App. 1981), the court held that an intentional infliction claim was stated where the employer harassed the employee for refusing to falsify reports. The intentional infliction tort also applies far beyond the employment context, often focusing on a series or pattern of bad

acts. E.g., *Woodruff v. Miller*, 387 S.E. 2d 176 (N.C. App. 1983); *Muratore v. MLS Scotia Prince*, 656 F. Supp. 471 (D. Me. 1987), *aff'd* 845 F. 2d 347, 352 (1st Cir. 1988).

The import of the foregoing cases is that states are free to employ their common law tradition in recognizing multiple layers of protection from abusive employer misconduct, thus affording full damage remedies along with the right to trial by jury. Since there is no conflict in the state and federal provisions, there is no legitimate basis to abrogate time-honored state law. The Fourth Circuit's holding in the case *sub judice* denies Vera English and employees everywhere their fundamental right to trial by jury as guaranteed by the North Carolina and United States Constitutions.

D. North Carolina's Independent Judiciary Affords An Essential Forum For Employee Protection.

North Carolina employees such as Vera English are entitled to access state courts for traditional remedies pursuant to Article I, Section 18 (Open Court Clause) of the North Carolina Constitution. The Open Court Clause provides: "All courts shall be open; every person for an injury done him in his lands, good, person or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." The reasoning of the North Carolina Supreme Court in *Coman* is especially instructive: "Although plaintiff may have some additional remedy in the federal courts, the courts of North Carolina cannot fail to provide a forum to determine a valid cause of action." 381 S.E. 2d at 446. Article 1, Section 1 of the North Carolina Constitution further endows individuals with a constitutional right to enjoy the fruits of one's labor. See *Treants v. Onslow County*, 350 S.E. 2d 365 (N.C. App.), *aff'd* 360 S.E. 2d 783 (1987).

States are free to provide greater remedies than those afforded by Congress or by the federal constitution. In *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 81 (1980), this Court recognized the authority of a state "to adopt in its own constitution individual liberties more expansive than those conferred by the federal constitution." *Accord Oregon v. Hass*, 420 U.S. 714, 719 (1975); see *Cooper v. California*, 386 U.S. 58, 62 (1967). More specifically, in *Silkwood v. Kerr-McGee*, 464 U.S. 238, 257-58



(1984), this Court held that states are free to impose greater liability on offending employers that Congress has seen fit to impose. Here, the Fourth Circuit's decision pervasively tramples upon traditional states' rights without any supporting Congressional intent. Rather, the decision below serves only to frustrate North Carolina's history of providing redress to employees subjected to tortious emotional distress by abusive employers.

### CONCLUSION

Wherefore, Amicus PELA respectfully urges this Court to reverse the judgement below and to remand this case for trial.

J. Michael McGuinness \*  
Lisa A. Parlagreco  
Counsel For Amicus, PELA  
P.O. Box 5939, JFK Station  
Boston, MA 02114  
(617) 742-1900

Of Counsel  
Paul Tobias  
911 Mercantile Library Bldg.  
414 Walnut Street  
Cincinnati, OH 45202  
(513) 241-8137

\* Counsel of Record

MAR 8 1990

No. 89-152

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

VERA M. ENGLISH,  
v. *Petitioner,*

GENERAL ELECTRIC COMPANY,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

BRIEF OF THE  
NATIONAL CONFERENCE OF STATE LEGISLATURES,  
NATIONAL ASSOCIATION OF COUNTIES,  
NATIONAL LEAGUE OF CITIES,  
COUNCIL OF STATE GOVERNMENTS,  
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,  
AND U.S. CONFERENCE OF MAYORS  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEVEN K. HOFFMAN  
BRADLEY M. CAMPBELL  
ROGOVIN, HUGE & SCHILLER  
1250 24th Street, N.W.  
Washington, D.C. 20037  
(202) 467-8300  
*Of Counsel*

BENNA RUTH SOLOMON  
Chief Counsel  
STATE AND LOCAL  
LEGAL CENTER  
444 North Capitol St., N.W.  
Suite 349  
Washington, D.C. 20001  
(202) 638-1445  
*Counsel of Record for the  
Amici Curiae*

39142

### **QUESTION PRESENTED**

Whether the limited remedy available to "whistle-blower" employees under Section 210 of the Energy Reorganization Act of 1978 for retaliation by nuclear facility operators preempts a state tort claim of intentional infliction of emotional distress.



## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	v
INTEREST OF THE <i>AMICI CURIAE</i> .....	1
STATEMENT .....	3
INTRODUCTION AND SUMMARY OF ARGUMENT .....	5
ARGUMENT .....	7
I. THE STATES' COMPELLING INTEREST IN REMEDYING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN THE EMPLOYMENT CONTEXT PRECLUDES PRE-EMPTION OF THAT CLAIM .....	7
A. The States Have Firmly Established Their Interest In Remediating The Intentional Infliction Of Emotional Distress Both In And Outside The Workplace .....	7
B. This Court Has Determined That The States' Compelling Interest In Remediating The Intentional Infliction Of Emotional Distress Is Peripheral To The Federal Interest In Remediating Discrimination In The Workplace .....	11
II. CONGRESS DID NOT INTEND THE ENERGY REORGANIZATION ACT'S REMEDY FOR EMPLOYMENT DISCRIMINATION AGAINST WHISTLEBLOWERS TO SUPPLANT THE STATES' SETTLED AUTHORITY TO PROTECT EMPLOYEES FROM OUTRAGEOUS CONDUCT .....	13

## TABLE OF CONTENTS—Continued

	Page
A. Congress Did Not Intend The Whistleblower Provision To Preempt The States' Authority To Regulate Intentional Torts Like The Intentional Infliction Of Emotional Distress....	14
1. <i>The Atomic Energy Act accommodates state causes of action to remedy extreme tortious conduct</i> .....	14
2. <i>The ERA evinces no congressional intent to preempt a claim of intentional infliction of emotional distress</i> .....	16
B. Preemption Of The State Claim Presented Would Impermissibly Eliminate Or Curtail A Remedy For The Victims Of Intentional Torts .....	20
III. STATE REMEDIES FOR THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS NEITHER INTERFERE NOR CONFLICT WITH THE REMEDIES PROVIDED BY THE ERA .....	21
A. A State Remedy To Redress Tortious Conduct Does Not Interfere With The Section 210 Remedial Scheme Because The State Need Not Resolve Or Intrude On Issues Of Federal Law Or Policy .....	22
B. Recovery For Intentional Infliction Of Emotional Distress Does Not Conflict With The Provisions Of Section 210 .....	24
C. The Courts Are Amply Equipped To Eliminate Any Incidental Effects Of A State Remedy For Intentional Infliction Of Emotional Distress On The Federal Interests Manifested In Section 210 .....	27
CONCLUSION .....	29

## TABLE OF AUTHORITIES

CASES:	Page
<i>Ailetcher v. Beneficial Finance Co.</i> , 2 Haw. App. 301, 632 P.2d 1071 (1981) .....	8
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985) .....	13
<i>Alsteen v. Gehl</i> , 21 Wis. 2d 349, 124 N.W.2d 312 (1963) .....	8
<i>Amalgamated Ass'n of Street, Electric Railway &amp; Motor Coach Employees v. Lockridge</i> , 403 U.S. 274 (1971) .....	22
<i>American Road Service Co. v. Inmon</i> , 394 So. 2d 361 (Ala. 1981) .....	8
<i>Amsden v. Grinnell Mutual Reinsurance Co.</i> , 203 N.W.2d 252 (Iowa 1972) .....	8
<i>Atchison, Topeka &amp; Santa Fe Railway Co. v. Buell</i> , 480 U.S. 557 (1987) .....	23
<i>Batchelor v. Sears Roebuck &amp; Co.</i> , 574 F. Supp. 1480 (E.D. Mich. 1983) .....	10
<i>Belknap, Inc. v. Hale</i> , 463 U.S. 491 (1983) .....	12, 25
<i>Branda v. Sanford</i> , 97 Nev. 643, 637 P.2d 1223 (1981) .....	8
<i>Breeden v. League Services Corp.</i> , 575 P.2d 1374 (Okla. 1978) .....	8
<i>Burgess v. Chicago Sun-Times</i> , 132 Ill. App. 3d 181, 476 N.E.2d 1284 (1983) .....	10
<i>California v. ARC America Corp.</i> , 109 S. Ct. 1661 (1989) .....	26
<i>California Coastal Comm'n v. Granite Rock Co.</i> , 107 S. Ct. 1419 (1987) .....	24
<i>Caterpillar Inc. v. Williams</i> , 482 U.S. 386 (1987) ..	7, 22
<i>Champlin v. Washington Trust Co.</i> , 478 A.2d 985 (R.I. 1984) .....	8
<i>Dawson v. Associates Financial Services Co.</i> , 215 Kan. 814, 529 P.2d 104 (1974) .....	8
<i>Dickens v. Puryear</i> , 302 N.C. 437, 276 S.E.2d 325 (1981) .....	8, 9
<i>Dixon v. Stuart</i> , 85 N.C. App. 338, 354 S.E.2d 757 (1987) .....	4-5, 10

## TABLE OF AUTHORITIES—Continued

	Page
<i>English v. Whitfield</i> , 858 F.2d 957 (4th Cir. 1988) .....	4
<i>Exxon Corp. v. Governor of Maryland</i> , 437 U.S. 117 (1978) .....	24
<i>Farmer v. United Brotherhood of Carpenters &amp; Joiners, Local 25</i> , 470 U.S. 290 (1977) .....	passim
<i>First National Bank v. Braydon</i> , 84 S.D. 89, 167 N.W.2d 381 (1969) .....	9
<i>Fischer v. Maloney</i> , 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978) .....	8
<i>Ford Motor Credit Co. v. Sheehan</i> , 373 So. 2d 956 (Fla. 1st Dist. Ct. App.), cert. dismissed, 379 So. 2d 204 (Fla. 1979) .....	9
<i>Fort Halifax Packing Co. v. Coyne</i> , 482 U.S. 1 (1987) .....	13
<i>Gellert v. Eastern Air Lines</i> , 370 So. 2d 802 (Fla. 3rd Dist. Ct. App. 1979) .....	9
<i>George v. Jordan Marsh Co.</i> , 359 Mass. 244, 268 N.E.2d 915 (1971) .....	8
<i>Goodyear Atomic Corp. v. Miller</i> , 108 S. Ct. 1704 (1988) .....	16, 20
<i>Grimsby v. Samson</i> , 85 Wash. 2d 52, 530 P.2d 291 (1975) .....	8
<i>Hatfield v. Max Rouse &amp; Sons Northwest</i> , 100 Idaho 340, 606 P.2d 944 (1980) .....	8
<i>Hillsborough County v. Automated Medical Laboratories</i> , 471 U.S. 707 (1985) .....	16
<i>Howard University v. Best</i> , 484 A.2d 958 (D.C. App. 1984) .....	8
<i>Hubbard v. United Press International</i> , 330 N.W. 2d 428 (Minn. 1983) .....	8
<i>Hudson v. Zenith Engraving Co.</i> , 273 S.C. 766, 259 S.E.2d 812 (1979) .....	8
<i>Hume v. Bayer</i> , 157 N.J. Super. 310, 428 A.2d 966 (1981) .....	8
<i>International Union, UAW v. Russell</i> , 356 U.S. 634 (1958) .....	12, 19, 20, 21, 26
<i>Kanawha Valley Power Co. v. Justice</i> , 383 S.E.2d 313 (W.Va. 1989) .....	8

## TABLE OF AUTHORITIES—Continued

	Page
<i>Kersul v. Skulls Angels Inc.</i> , 130 Misc. 2d 345, 495 N.Y.S.2d 886 (Sup. Ct. 1985) .....	10
<i>Kirwin v. New York State Office of Mental Health</i> , 665 F. Supp. 1034 (E.D.N.Y. 1987) .....	11
<i>Knierim v. Izzo</i> , 22 Ill. 2d 73, 174 N.E.2d 157 (1961) .....	8
<i>Leedom v. Kyne</i> , 358 U.S. 184 (1958) .....	19
<i>Lingle v. Norge Division of Magic Chef, Inc.</i> , 108 S. Ct. 1877 (1988) .....	7, 23, 24
<i>Linn v. United Plant Guard Workers of America</i> , 383 U.S. 53 (1966) .....	12, 27-28
<i>Malone v. White Motor Corp.</i> , 435 U.S. 497 (1978) .....	13
<i>M.B.M. Co. v. Counce</i> , 268 Ark. 269, 596 S.W.2d 681 (1980) .....	8
<i>Medlin v. Allied Investment Co.</i> , 217 Tenn. 469, 398 S.W.2d 270 (1966) .....	8
<i>Metropolitan Life Insurance Co. v. Massachusetts</i> , 471 U.S. 724 (1985) .....	13
<i>Mindt v. Shavers</i> , 214 Neb. 786, 337 N.W.2d 97 (1983) .....	8-9
<i>Muchow v. Lindblad</i> , 435 N.W.2d 918 (N.D. 1989) .....	8
<i>Murray v. Bridgeport Hospital</i> , 40 Conn. Sup. 56, 480 A.2d 610 (1984) .....	8
<i>Norris v. Lumbermen's Mutual Casualty Co.</i> , 881 F.2d 1144 (1st Cir. 1989) .....	17
<i>Oldfather v. Ohio Dep't of Transportation</i> , 653 F. Supp. 1167 (S.D. Ohio 1986) .....	10
<i>Paasch v. Brown</i> , 193 Neb. 368, 227 N.W.2d 402 (1975) .....	8
<i>Pacific Gas &amp; Electric Co. v. Energy Resources Conservation &amp; Development Comm'n</i> , 461 U.S. 190 (1983) .....	14, 15, 16
<i>Pack v. Wise</i> , 155 So. 2d 909 (La. App. 1963) .....	8
<i>Pakos v. Clark</i> , 253 Or. 113, 453 P.2d 682 (1969) ..	8
<i>Papieves v. Lawrence</i> , 437 Pa. 373, 263 A.2d 118 (1970) .....	8



## TABLE OF AUTHORITIES—Continued

	Page
<i>Pelizza v. Reader's Digest Sales &amp; Service Inc.</i> , 624 F. Supp. 806 (N.D. Ill. 1985) .....	10
<i>Peterson v. First Federal Savings &amp; Loan Ass'n</i> , 617 F. Supp. 1039 (D. St. Croix 1985) .....	10
<i>Plante v. Engel</i> , 469 A.2d 1299 (N.H. 1983) .....	8
<i>Polson v. David</i> , 635 F. Supp. 1130 (D. Kan. 1986) .....	11
<i>Pratt v. Caterpillar Tractor Co.</i> , 149 Ill. App. 3d 588, 500 N.E.2d 1001 (1986) .....	10
<i>Pretsky v. Southwestern Bell Telephone Co.</i> , 396 S.W.2d 566 (Mo. 1965) .....	8
<i>Retail Clerks v. Schermerhorn</i> , 375 U.S. 96 (1963) .....	13
<i>R.J. Reynolds Tobacco Co. v. Durham County</i> , 107 S. Ct. 499 (1983) .....	16
<i>Rice v. Norman Williams Co.</i> , 458 U.S. 654 (1982) .....	24
<i>Richardson v. Fairbanks North Star Borough</i> , 705 P.2d 454 (Alaska 1985) .....	8
<i>Rugg v. McCarty</i> , 173 Colo. 170, 476 P.2d 753 (1970) .....	8
<i>Samms v. Eccles</i> , 11 Utah 2d 289, 358 P.2d 344 (1961) .....	8
<i>Sanders v. Lutz</i> , 784 P.2d 12 (N.M. 1989) .....	8
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) .....	11, 11-12, 12-13
<i>Savage v. Boies</i> , 77 Ariz. 355, 272 P.2d 349 (1954) .....	8
<i>Sears, Roebuck &amp; Co. v. San Diego County District Council of Carpenters</i> , 436 U.S. 180 (1978) .....	12
<i>Sheltra v. Smith</i> , 136 Vt. 472, 392 A.2d 431 (1978) .....	8
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) .....	passim
<i>Silkwood v. Kerr-McGee Corp.</i> , 485 F. Supp. 566 (W.D. Okla. 1979) .....	15
<i>State Rubbish Collectors Ass'n v. Siliznoff</i> , 38 Cal. 2d 330, 240 P.2d 282 (1952) .....	8
<i>Trans World Airlines v. Independent Federation of Flight Attendants</i> , 109 S. Ct. 1225 (1989) ....	19

## TABLE OF AUTHORITIES—Continued

	Page
<i>United Construction Workers v. Laburnum Con- struction Corp.</i> , 347 U.S. 656 (1954) .....	12, 15, 20, 21
<i>University of Tennessee v. Elliot</i> , 478 U.S. 788 (1986) .....	28
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967) .....	11
<i>Vicnire v. Ford Motor Credit Co.</i> , 401 A.2d 148 (Me. 1979) .....	8
<i>Warren v. June's Mobile Home Village &amp; Sales</i> , 66 Mich. App. 386, 239 N.W.2d 380 (1976) .....	8
<i>Womack v. Eldridge</i> , 215 Va. 338, 210 S.E.2d 145 (1974) .....	8
<i>Yeager v. Local Union 20, Teamsters</i> , 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983) .....	8

## CONSTITUTIONAL PROVISION:

Supremacy Clause, U.S. Const. Art. VI, cl. 2 .....	passim
--	--------

## STATUTES AND REGULATIONS:

Atomic Energy Act of 1954, 42 U.S.C. § 2011 <i>et</i> <i>seq.</i> .....	6, 14, 17, 23, 25
42 U.S.C. § 2021(k) .....	14
Energy Reorganization Act of 1978, § 210, 42 U.S.C. § 5851 .....	passim
42 U.S.C. § 5851(a) .....	18, 23, 25
42 U.S.C. § 5851(a)-(b) .....	21
42 U.S.C. § 5851(a)-(g) .....	4
42 U.S.C. § 5851(b) .....	25
42 U.S.C. § 5851(b)(1) .....	17, 18, 24
42 U.S.C. § 5851(b)(2)(B) .....	4, 19, 20-21, 25
42 U.S.C. § 5851(d) .....	26
42 U.S.C. § 5851(g) .....	21, 24, 25
Federal Employer's Liability Act, 45 U.S.C. § 51 <i>et seq.</i> .....	23
Labor Management Relations Act of 1947, 29 U.S.C. § 141 <i>et seq.</i> .....	6, 12, 17, 18, 19
National Labor Relations Act of 1935, 29 U.S.C. § 151 <i>et seq.</i> .....	6, 17, 19
29 U.S.C. § 158 .....	17
29 U.S.C. § 158(a) .....	18

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C. § 158 (a) (3) .....	18
29 U.S.C. § 158 (a) (4) .....	17, 18
29 U.S.C. § 160 .....	18
29 U.S.C. § 160 (b) .....	18, 27
29 U.S.C. § 160 (c) .....	18
Pub. L. No. 95-601, 92 Stat. 2947 (1978) .....	14, 16
Railway Labor Act, 45 U.S.C. § 151 <i>et seq.</i> .....	19, 23
45 U.S.C. § 153 First (i) .....	23
29 C.F.R. § 24.6 (b) (2) .....	21

LEGISLATIVE MATERIALS:

S. Rep. No. 848, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 7303.....	14, 17, 21
---	---------------

MISCELLANEOUS:

Austin, <i>Employer Abuse, Worker Resistance and the Tort of Intentional Infliction of Emotional Distress</i> , 41 Stan. L. Rev. 1 (1988) .....	10, 11
Givelber, <i>The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct</i> , 82 Colum. L. Rev. 42 (1982) .....	9, 15
<i>Restatement (Second) of Torts</i> (1965) .....	8, 9, 10, 28

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-152

VERA M. ENGLISH,  
v. *Petitioner,*

GENERAL ELECTRIC COMPANY,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

BRIEF OF THE  
NATIONAL CONFERENCE OF STATE LEGISLATURES,  
NATIONAL ASSOCIATION OF COUNTIES,  
NATIONAL LEAGUE OF CITIES,  
COUNCIL OF STATE GOVERNMENTS,  
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,  
AND U.S. CONFERENCE OF MAYORS  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. These organizations and their members have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments.

*Amici* have an abiding interest in preserving the power of state governments to protect their citizens from intentional tortious conduct and to provide common law reme-



dies for the victims of such conduct. This case is of grave concern to *amici* because of the casual inference by the courts below that Congress intended that a "whistle-blower" protection statute, Section 210 of the Energy Reorganization Act of 1978, 42 U.S.C. § 5851 ("ERA"), would preempt state tort laws that do not conflict with either the national labor laws or the federal nuclear regulatory scheme.

Like forty-one other States and the District of Columbia, the State of North Carolina recognizes a cause of action for the intentional infliction of emotional distress, whether the tortfeasor inflicts the harm in the workplace, in the public streets, or in the homes of its citizens. Like the other States, North Carolina provides remedies, including punitive damages, to victims of severe emotional distress caused by "outrageous" conduct. Affirmance of the Fourth Circuit's decision that Section 210 preempts part of that power will jeopardize the States' efforts to provide such protection and such remedies.

The inevitable effect of the Fourth Circuit's decision would be to immunize employers in the nuclear field from liability for conduct for which all other North Carolina employers are severely sanctioned, conduct that in no way implicates the federal interest in reporting nuclear safety hazards. It would also deprive nuclear employees of remedies available to all other similarly situated North Carolinians, remedies unavailable under the ERA. In short, affirmance of the decision below would severely circumscribe the ability of the States to proscribe and to redress conduct that transgresses the fundamental norms of a civilized society.

*Amici* submit that the decision below is wrong and should be reversed. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.<sup>1</sup>

<sup>1</sup> Pursuant to Rule 37 of the Rules of this Court, the parties' letters of consent have been filed with the Clerk.

### STATEMENT

For almost twelve years, petitioner Vera M. English ("English") worked for respondent, the General Electric Company ("GE"), as a laboratory technician inspecting nuclear fuel pellets containing uranium at GE's nuclear fuel processing facility in Wilmington, North Carolina. J.A. 8-10. In the course of her work, English witnessed serious safety violations and reported them to the Nuclear Regulatory Commission ("NRC") and to her GE supervisor in February 1984. J.A. 11. When GE failed to take corrective action, English took it upon herself to highlight those violations. J.A. 12. At the end of her work shift on March 10, 1984, English intentionally failed to clean up contaminated material left by other employees in the vicinity of her work station. J.A. 12. Instead, she highlighted the contaminated material with the red tape used for that purpose. J.A. 12. When she returned for her next shift on March 12, 1984, and found the area as she had left it, she informed her supervisor. J.A. 13.

At this point, GE suspended operations in the laboratory and took action to correct many of the problems English had identified. J.A. 13. On March 15, 1984, however, GE brought a series of written charges against English, ordered her removed from the laboratory, barred her from further work with radioactive materials, re-assigned her to a position in a warehouse at the facility, and placed her on probation. J.A. 13-14. More pertinent for the purpose of the instant case is the abusive manner in which GE effected this discipline. First, it had English physically removed from the laboratory under guard, thereby exposing her to the ridicule of her fellow employees. J.A. 14. Then, for the next three months, it subjected her to a campaign of clearly visible surveillance and harassment, including forbidding her to eat in the company lunch room with her fellow employees. J.A. 14-15. As a result of GE's treatment, English suffered severe depression, requiring psychiatric treatment. J.A. 18. Finally, on July 30, 1984, having failed to place her



in another permanent position, GE discharged her. J.A. 16-17.

Consequently, on August 24, 1984, English filed a complaint against GE pursuant to Section 210 of the Energy Reorganization Act of 1978 ("ERA"), 42 U.S.C. § 5851. Section 210 provides an administrative cause of action to employees in the nuclear industry who believe that they have been discharged or otherwise discriminated against with respect to compensation, terms, conditions, or privileges of employment because they have reported safety violations. 42 U.S.C. § 5851(a)-(g). Although codified with the provisions governing the operation of the NRC, Section 210 delegates to the Secretary of Labor the task of investigating complaints by whistleblowers. In the event that the Secretary finds a violation of the statute, she is authorized to order the complainant reinstated to her former position and to award back pay. 42 U.S.C. § 5851(b)(2)(B). In addition, the Secretary "may" award compensatory damages to the complainant. *Ibid.* The Secretary dismissed English's complaint as untimely, and the Fourth Circuit Court of Appeals affirmed. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988).<sup>2</sup>

English then brought this diversity action against GE in federal district court in North Carolina, alleging state law claims for wrongful discharge and intentional infliction of emotional distress and seeking compensatory and punitive damages. The district court dismissed the wrongful discharge claim. Pet. App. 25a.<sup>3</sup> Relying on *Dixon*

<sup>2</sup> Although the court of appeals affirmed, it remanded the case for consideration of the timeliness of English's claim of a continuing violation of the statute. 858 F.2d at 964. When an administrative law judge dismissed that claim as well, English appealed to the Secretary. That appeal is still pending.

<sup>3</sup> It did so on the alternative grounds that English had failed to state a claim for wrongful discharge under North Carolina law and that Section 210 of the ERA preempted wrongful discharge claims. Pet. App. 23a-25a. English did not appeal the dismissal of her wrongful discharge claim.

*v. Stuart*, 85 N.C. App. 338, 354 S.E. 2d 757 (1987), the court held that English had indeed stated a cause of action for intentional infliction of emotional distress by alleging that GE had wilfully and maliciously engaged in "'extreme and outrageous'" conduct toward her, causing her to suffer "severe emotional distress." Pet. App. 27a. The court further held, however, that this claim was preempted by Section 210 of the ERA. *Id.* at 28a-29a.

The district court recognized that English's complaint only tangentially concerned nuclear safety; therefore, it could not be preempted on the ground that it impinged on a matter committed exclusively to federal regulation. Pet. App. 17a, 18a. Rather, the court concluded that Section 210 itself was so comprehensive as to preclude any effort by the States to supplement its remedial provisions. *Id.* at 22a-23a. The court expressly declined to apply this Court's decision in *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977), to the case before it—although *Farmer* squarely held that the remedial procedure for employment discrimination administered by the National Labor Relations Board did not preempt a state claim for intentional infliction of emotional distress—on the ground that *Farmer* created only a "'narrow exception to federal preemption.'" Pet. App. 28a. Finally, the court indicated its belief that English's emotional distress claim should be presented to the Secretary of Labor because all but one of the allegations supporting that claim could also support a Section 210 proceeding. *Ibid.* In a brief *per curiam* decision, the Fourth Circuit adopted the district court's reasoning and affirmed. *Id.* at 2a-3a.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns an issue close to the core of the States' unquestioned interest in matters relating to public health and safety: the power to provide a remedy for conduct that is intolerable in a civilized society. In holding that petitioner's claim for intentional infliction of emotional distress was preempted by Section 210 of the

ERA, the lower courts not only trivialized that fundamental state interest but also disregarded this Court's ample indications that such causes of action are not displaced by federal regulations either in the field of atomic energy or in labor relations.

Initially, the courts below failed to heed the lesson of *Farmer v. Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977). In *Farmer*, this Court recognized the States' compelling interest in redressing the intentional infliction of emotional distress and held that the claim could comfortably coexist with the comprehensive federal scheme regulating discrimination in employment created by the National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947—the models for Section 210. Erroneously concluding that *Farmer* created only a "narrow exception to federal preemption," the district court rested its preemption analysis on what it deemed to be the pervasiveness of Section 210's remedial mechanism and a potential for conflict between that scheme and petitioner's otherwise valid cause of action.

In reaching this conclusion, the court failed to take adequate cognizance of the larger regulatory scheme that Congress established in the Atomic Energy Act of 1954, of which Section 210 of the ERA is a part. As this Court held in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the federal nuclear regulatory scheme, like the federal labor law apparatus, accommodates common law remedies for the sort of "outrageous" misconduct at issue in this case. Further, *Silkwood* confirmed the presumption against inferring preemption of state causes of action that would deprive a class of individuals of protection from intentional tortious misconduct. Therefore, without explicit congressional direction on the subject, the Court would not find preemption of a state cause of action unless that cause of action created palpable interference or direct conflict with federal interests.

Although there is no express statement of congressional preemptive intent in Section 210, the district court pur-

ported to find both interference and conflict. In doing so, however, the court ignored the analytical standards that this Court has devised for making such evaluations in the *Farmer* line of cases and, more recently, in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), and *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988). In its analysis, the court also overlooked the host of traditional methods the federal and state courts can employ to ensure that adjudication of petitioner's claim would not encroach even tangentially upon federal interests.

To remove the threat to the States' interest the decisions below portend, this Court should explicitly reaffirm the principle of *Silkwood* and *Farmer*: that the States' traditional authority to redress intentional torts should not be displaced in the absence of explicit congressional direction unless a particular state regulation actually interferes or conflicts with federal interests. Because petitioner's damages claim for intentional infliction of emotional distress creates no such interference or conflict with Section 210, there is no basis for preempting that claim.

## ARGUMENT

### I. THE STATES' COMPELLING INTEREST IN REMEDYING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN THE EMPLOYMENT CONTEXT PRECLUDES PREEMPTION OF THAT CLAIM.

#### A. The States Have Firmly Established Their Interest In Remediating The Intentional Infliction Of Emotional Distress Both In And Outside The Workplace.

The States' interest in affording common law protection to their citizens from the intentional infliction of emotional distress is close to the core of their unquestioned interest in protecting the health and wellbeing of their citizens. *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290, 303 (1977). At least forty-two States and the District of Columbia have



definitively recognized the tort.<sup>4</sup> Most have adopted

<sup>4</sup> Thirty-nine jurisdictions have adopted the formulation of the tort in the *Restatement (Second) of Torts* (1965); *American Road Serv. Co. v. Inmon*, 394 So. 2d 361 (Ala. 1981); *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454 (Alaska 1985); *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W. 2d 681 (1980); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970); *Murray v. Bridgeport Hosp.*, 40 Conn. Sup. 56, 480 A.2d 610 (1984); *Howard Univ. v. Best*, 484 A.2d 958 (D.C. App. 1984); *Ailetcher v. Beneficial Fin. Co.*, 2 Haw. App. 301, 632 P.2d 1071 (1981); *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944 (1980); *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); *Amsden v. Grinnell Mutual Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1972); *Dawson v. Associates Fin. Serv. Co.*, 215 Kan. 814, 529 P.2d 104 (1974); *Vicnir v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979); *George v. Jordan Marsh Co.*, 359 Mass. 244, 268 N.E.2d 915 (1971); *Warren v. Jane's Mobile Home Village & Sales*, 66 Mich. App. 386, 239 N.W.2d 380 (1976); *Hubbard v. United Press Int'l*, 330 N.W.2d 428 (Minn. 1983); *Pretsky v. Southwestern Bell Tel. Co.*, 396 S.W.2d 566 (Mo. 1965); *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402 (1975); *Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223 (1981); *Plante v. Engel*, 469 A.2d 1299 (N.H. 1983); *Hume v. Bayer*, 157 N.J. Super. 310, 428 A.2d 966 (1981); *Sanders v. Lutz*, 784 P.2d 12 (N.M. 1989); *Fischer v. Maloney*, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978); *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981); *Muchow v. Lindblad*, 435 N.W.2d 918 (N.D. 1989); *Yeager v. Local Union 20, Teamsters*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983); *Breeden v. League Servs. Corp.*, 575 P.2d 1374 (Okla. 1978); *Pakos v. Clark*, 253 Or. 113, 453 P.2d 682 (1969); *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970); *Champlin v. Washington Trust Co.*, 478 A.2d 985 (R.I. 1984); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 259 S.E.2d 812 (1979); *Medlin v. Allied Invest. Co.*, 217 Tenn. 469, 398 S.W.2d 270 (1966); *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 341 (1961); *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974); *Sheltra v. Smith*, 136 Vt. 472, 392 A.2d 431 (1978); *Grimsby v. Samson*, 85 Wash. 2d 52, 530 P.2d 291 (1975); *Kanawha Valley Power Co. v. Justice*, 383 S.E.2d 313 (W.Va. 1989); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

Three jurisdictions recognize the tort without expressly adopting the *Restatement* formulation: *Pack v. Wise*, 155 So.2d 909 (La. App. 1963); *Mindt v. Shavers*, 214 Neb. 786, 337 N.W.2d 97

some variation on the formulation of the tort set forth in the *Restatement (Second) of Torts*, § 46(1) (1965): "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." See *supra* at 8 n.4. "[M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to trigger liability. *Restatement*, § 46(1) comment d. Rather, to be actionable, the tort-feasor's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Ibid.* Similarly, the States do not afford relief for mere hurt feelings: "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Ibid.* comment j. North Carolina sets a comparably high threshold for stating a claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Because actionable conduct must be "outrageous" and therefore deserving of punishment, a successful claimant may often receive both compensatory and punitive damages.<sup>5</sup>

Like the other States that have recognized the tort, North Carolina entertains claims for intentional infliction

(1983); *First Nat'l Bank v. Bragdon*, 84 S.D. 89, 167 N.W.2d 381 (1969).

Florida courts are split on the question of adopting the *Restatement* version. See *Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956 (Fla. 1st Dist. Ct. App.), cert. dismissed, 379 So. 2d 204 (Fla. 1979); *Gellert v. Eastern Air Lines*, 370 So. 2d 802 (Fla. 3rd Dist. Ct. App. 1979).

<sup>5</sup> See generally Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 54 (1982) (hereinafter "*Intentional Infliction*").

None of the reported decisions reviewed suggests that reinstatement or other tangible employment benefits are available as a remedy for the intentional infliction of emotional distress.



tion of emotional distress that arise in the employment context. *E.g.*, *Dixon*, 354 S.E.2d at 453-59. Such claims are subject to the same high threshold imposed on claims outside the employment context.<sup>6</sup> For instance, the transitory emotional upset accompanying unfair or unpleasant work assignments, heavy workload, or other terms and conditions of employment is not actionable.<sup>7</sup> Neither is the mere fact of unfair dismissal<sup>8</sup> or other forms of employment discrimination.<sup>9</sup> Finally, neither employment discrimination nor outright dismissal meted out in retaliation for whistleblowing is actionable unless the claimant can establish that such retaliation is accompanied by or perpetrated with the requisite level of "outrageous" conduct.<sup>10</sup> The often severe deprivations

<sup>6</sup> As one commentator has found after studying cases deciding such claims in the employment context,

[o]nly the extraordinary, the excessive, and the nearly bizarre in the way of supervisory intimidation and humiliation warrant judicial relief through the tort of intentional infliction of emotional distress. All other forms of supervisory conduct that cause workers to experience emotional harm are more or less "trivial" in the terminology of the *Restatement of Torts*.

Austin, *Employer Abuse, Worker Resistance and the Tort of Intentional Infliction of Emotional Distress*, 41 Stan. L. Rev. 1, 18 (1988) (hereinafter "*Employer Abuse*").

<sup>7</sup> *E.g.*, *Peterson v. First Federal Sav. & Loan Ass'n*, 617 F. Supp. 1039 (D. St. Croix 1985) (working conditions); *Burgess v. Chicago Sun-Times*, 132 Ill. App. 3d 181, 476 N.E. 2d 1284 (1983) (work assignments).

<sup>8</sup> *E.g.*, *Pelizza v. Reader's Digest Sales & Serv. Inc.*, 624 F. Supp. 806 (N.D. Ill. 1985); *Batchelor v. Sears Roebuck & Co.*, 574 F. Supp. 1480 (E.D. Mich. 1983).

<sup>9</sup> *E.g.*, *Oldfather v. Ohio Dep't of Transp.*, 653 F. Supp. 1167 (S.D. Ohio 1986); *Kersul v. Skulls Angels Inc.*, 130 Misc. 2d 345, 495 N.Y.S. 2d 886 (Sup. Ct. 1985).

<sup>10</sup> See, *e.g.*, *Pratt v. Caterpillar Tractor Co.*, 149 Ill. App. 3d 588, 500 N.E. 2d 1001 (1986) (discharge in retaliation for refusal to violate federal statute does not sustain a state law outrage claim);

an employee may suffer as a result of discrimination in the workplace do not alone give rise to a claim of intentional infliction of emotional distress. The cause of action is only available to compensate for truly severe emotional distress suffered as a result of conduct that passes all recognized boundaries of social interaction.

**B. This Court Has Determined That The States' Compelling Interest In Remediating The Intentional Infliction Of Emotional Distress Is Peripheral To The Federal Interest In Remediating Discrimination In The Workplace.**

In *Farmer*, this Court held that the federal labor laws enacted to protect workers against discrimination in employment do not preempt a claim of intentional infliction of emotional distress. In so holding, the Court devised an analytical framework that should be dispositive of the preemption issue here. *Farmer* arose out of alleged discriminatory treatment in job referrals at a union hiring hall. The plaintiff alleged, *inter alia*, that the defendants "had intentionally engaged in outrageous conduct, threats, and intimidation, and had thereby caused him to suffer grievous emotional distress resulting in bodily injury." 430 U.S. at 293. The Court recognized that this claim "might form the basis for unfair labor practice charges before the [National Labor Relations] Board" (*ibid.* at 302), and, quoting *Vaca v. Sipes*, 386 U.S. 171 (1967), expressly indicated that "'potentially conflicting [state] 'rules of law, of remedy, and of administration' cannot be permitted to' " invade the province of the Board. 430 U.S. at 295 (quoting *Vaca v. Sipes*, 386 U.S. at 178-79 (1967) (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959))). In analyzing the preemption question, however, the Court applied the rule developed in *Garmon*:

*Kirwin v. New York State Office of Mental Health*, 665 F. Supp. 1034 (E.D.N.Y. 1987) (reassignment in retaliation for cooperation with investigator); *Polson v. David*, 635 F. Supp. 1130 (D. Kan. 1986) (termination for objection to noncompliance with antidiscrimination laws). See generally *Employer Abuse* at 5-15.

namely, that preemption would not be appropriate if the activity complained of “‘was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.’” *Farmer*, 430 U.S. at 296-97, quoting *Garmon*, 359 U.S. at 243-44.

With that analytical framework in place, the *Farmer* Court held that “[t]he State . . . has a substantial interest in protecting its citizens from” the intentional infliction of emotional distress. 430 U.S. at 302. It further held that whatever “potential for interference” the adjudication of the tort might pose for the NLRB was insufficient to warrant preemption of the state tort action. *Id.* at 304.

*Farmer*, moreover, is only one in an unbroken series of decisions in which this Court has vindicated the States’ plenary power to remedy intentionally tortious conduct, even when that conduct arises in the context of a labor dispute within the primary jurisdiction of the NLRB. See *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-512 (1983) (misrepresentation); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 207 (1978) (trespass by picketing); *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 59-61 (1966) (malicious libel); *International Union, UAW v. Russell*, 356 U.S. 634, 646 (1958) (malicious interference with lawful occupation by means of mass picketing); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 669 (1954) (intimidation by picketing with threats of violence).

These cases establish a heightened standard for preemption—even in the pervasively regulated and predominately federal preserve of employment relations—when the States’ interest is as substantial as it is in regulating intentional tortious conduct like the intentional infliction of emotional distress. See *Garmon*, 359 U.S. at

244; see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (“pre-emption should not be lightly inferred” in areas “within the traditional police power of the State”).

## II. CONGRESS DID NOT INTEND THE ENERGY RE-ORGANIZATION ACT’S REMEDY FOR EMPLOYMENT DISCRIMINATION AGAINST WHISTLE-BLOWERS TO SUPPLANT THE STATES’ SETTLED AUTHORITY TO PROTECT EMPLOYEES FROM OUTRAGEOUS CONDUCT.

In determining the preemptive scope of a federal enactment, “‘[t]he purpose of Congress is the ultimate touchstone.’” *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))). When Congress has not made the preemptive scope of a given enactment explicit, “courts sustain a local regulation ‘unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.’” *Allis-Chalmers*, 471 U.S. at 209 (quoting *Malone*, 435 U.S. at 504). This Court has been particularly slow to infer an intent to preempt a state cause of action relating to public health and safety because, as the Court declared in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), Congress is presumed to act “within the larger body of state law promoting public health and safety,” an area in which “States traditionally have had great latitude.” *Id.* at 756.

Neither Section 210 nor its legislative history speaks directly to the issue of preemption. The district court, however, concluded that Section 210 preempted petitioner’s right to state remedies against outrageous misconduct because the statute constituted “‘a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States



to supplement it.'” Pet. App. 22a-23a (quoting *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Comm’n*, 461 U.S. 190, 204 (1983)). In fact, the structure of the statute and its legislative history demonstrate that Congress never intended to displace the States’ fundamental authority to protect their citizens from the intentional infliction of emotional distress, even if such misconduct were perpetrated in the employment context. See *Farmer*, 430 U.S. at 302.

**A. Congress Did Not Intend The Whistleblower Provision To Preempt The States’ Authority To Regulate Intentional Torts Like The Intentional Infliction Of Emotional Distress.**

**1. The Atomic Energy Act accommodates state causes of action to remedy extreme tortious conduct.**

Section 210 of the ERA was enacted in 1978 as part of an appropriations package for the NRC. Pub. L. No. 95-601, 92 Stat. 2947 (1978). As such, it became part of the overall regulatory scheme initially devised by the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* (“AEA”). S. Rep. No. 848, 95th Cong., 2d Sess. 29, reprinted in 1978 U.S. Code Cong. & Admin. News 7303, 7303 (hereinafter “S. Rep.”). This Court has thoroughly reviewed the AEA and its legislative history and has concluded that Congress intended to displace state regulation concerning the safety aspects of nuclear facilities. *Pacific Gas & Electric*, 461 U.S. at 212-13. The Court also concluded that Congress did not intend to displace state regulation in *all* matters nuclear. As the Court declared in *Pacific Gas & Electric* itself, “Congress, by permitting regulation ‘for purposes other than protection against radiation hazards’ underscored the distinction . . . between the spheres of activity left respectively to the Federal Government and the States.” *Id.* at 210 (quoting 42 U.S.C. § 2021(k)).

Accordingly, this Court has upheld an award of punitive damages under state law to an employee of a nu-

clear facility who had been contaminated by plutonium. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). As the jury instructions in *Silkwood* indicate, those damages were predicated on extreme misconduct analogous to that alleged here:

“The jury may give damages for the sake of example and by way of punishment, if the jury finds the defendant or defendants have been guilty of oppression, fraud, or malice, actual or presumed. . . .

[Exemplary damages] may be allowed when there is evidence of such recklessness and wanton disregard of another’s rights that malice and evil intent will be inferred.”

*Id.* at 244-45 (quoting *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 603 (W.D. Okla. 1979)).<sup>11</sup> Although the *Silkwood* Court expressly noted its recent decision in *Pacific Gas & Electric* (464 U.S. at 249), it nevertheless declined to find a congressional intent to preempt the punitive damages award.<sup>12</sup>

Thus, even in cases implicating the decidedly federal preserve of nuclear safety, the Court has declined to infer that Congress has so completely and pervasively regulated the field as to preempt state regulation of oppressive, fraudulent, or malicious conduct. *Silkwood*, 464 U.S. at 256. On the contrary, preemption analysis in matters nuclear would henceforth focus on whether “there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objec-

<sup>11</sup> The tort of intentional infliction of emotional distress furthers the goals typically associated with punitive damage: punishment, deterrence, encouragement of suits to redress social wrongs, complete compensation, and the reaffirmation of societal values. *Intentional Infliction* at 54 n. 63.

<sup>12</sup> The Court cited *Laburnum*, 347 U.S. at 663-64, which held that Congress did not intend for the federal labor laws to preempt state causes of action to redress intentional torts. *Silkwood*, 464 U.S. at 251.



tives of the federal law." *Ibid.*; see also *Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704, 1712 (1988).

**2. The ERA evinces no congressional intent to preempt a claim of intentional infliction of emotional distress.**

The district court in this case correctly determined that Section 210 of the ERA did not purport to regulate nuclear safety and therefore fell outside the limited scope of federal nuclear safety regulation determined in *Pacific Gas & Electric* to preempt state law. Pet. App. 17a, 18a. The structure of the statute and its legislative history amply support that judgment. The lower court also held, however, that Section 210 established a scheme so pervasive as to leave no room for concurrent state regulation of intentional infliction of emotional distress. *Id.* at 22a-23a. In doing so, it ignored the clear direction of *Silkwood* as to the "pervasiveness" of the federal interest in nuclear regulation. It just as clearly erred in its conclusion that Section 210 "pervasively" regulated nuclear employment.<sup>13</sup>

Section 210 was enacted along with a series of measures to fund the NRC's efforts in projects directly concerned with nuclear safety: *i.e.*, nuclear reactor regulation; the development of low level radiation standards and nuclear materials safety and safeguards; and research into improved safety systems, the health effects of low level ionizing radiation, and safe disposal of nuclear waste. Pub. L. No. 95-601, 92 Stat. 2947-51. Section 210, however, was set apart from the safety-oriented provisions with its own heading: "Employee Pro-

<sup>13</sup> Rather than address the purposes that animated Congress, the district court simply assumed that the comprehensiveness of Section 210's provisions supported an inference of preemption. Pet. App. 22a-23a. This Court has long held, however, that the mere fact that a statute is comprehensive is not sufficient to support an inference of preemption. *R.J. Reynolds Tobacco Co. v. Durham County*, 107 S. Ct. 499, 512 (1986); *Hillsborough County v. Automated Med. Laboratories*, 471 U.S. 707, 717 (1985).

tection." *Id.* at 2951. According to the Senate Report on the Act, the provision was expressly designed to "offer[] protection to employees who believe they have been fired or discriminated against as a result of the fact that they have testified, given evidence, or brought suit under [the ERA] or the Atomic Energy Act." S. Rep. at 29, reprinted in 1973 U.S. Code Cong. & Admin. News at 7303. As if to underscore just how remote Congress's intent in enacting Section 210 was from the radiological safety concerns of the companion provisions of the ERA, Congress delegated the task of enforcing Section 210 to the Secretary of Labor—not to the NRC. 42 U.S.C. § 5851(b)(1).

The Senate Report also makes clear that the origins of Section 210 lie in areas not even vaguely connected with matters nuclear. In fact, the Section "is substantially identical to provisions in the Clean Air Act and the Federal Water Pollution Control Act," and "[t]he legislative history of those acts indicated that such provisions were patterned after the National Labor Management Act and a [subsequent and] similar provision in Public Law 91-173 relating to the health and safety of the Nation's coal miners." S. Rep. at 29, reprinted in 1978 U.S. Code Cong. & Admin. News at 7303.

The ultimate source of Section 210, then, is the so-called "National Labor Management Act," a statute that does not exist but is presumably an amalgamated reference to the National Labor Relations Act of 1935, 29 U.S.C. § 151 *et seq.* ("NLRA"), and the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* ("LMRA"), which amended the NLRA. See *Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144, 1147 (1st Cir. 1989) (repeating misnomer but citing 29 U.S.C. § 158). In fact, the language of Section 210 is virtually identical to the NLRA language in 29 U.S.C. § 158(a)(4), which makes it an unfair labor practice for an employer to discriminate in employment terms

and conditions against an employee because that employee has filed an unfair labor practice charge or given testimony in an unfair labor practice proceeding before the NLRB—i.e., a whistleblower.<sup>14</sup>

The remedial structure of the two whistleblower provisions also confirms that both were primarily conceived as labor-protective measures. They prescribe parallel administrative procedures before agencies charged with implementing labor policy: for whistleblowers under the LMRA, before the NLRB, 29 U.S.C. § 160; for nuclear whistleblowers, before the Secretary of Labor, 42 U.S.C. § 5851(b)(1). In each case, complaints alleging retaliatory discrimination must be filed within a short time period after the alleged violation takes place: for whistleblowers under the LMRA, six months, 29 U.S.C. § 160(b); for nuclear whistleblowers, thirty days, 42 U.S.C. § 5851(b)(1). In both instances, the administrative agency has limited authority to redress a complainant's injuries. The NLRB can order a discriminating employer to cease and desist from its discrimination and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c).

<sup>14</sup> Title 29 U.S.C. § 158(a) provides as follows:

It shall be an unfair labor practice for an employer— . . .  
(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.

As embellished in 29 U.S.C. § 158(a)(3), the use of the term "discrimination" in § 158(a)(4) is to be understood as "discrimination in regard to hire or tenure of employment or any term or condition of employment."

The pertinent part of Section 210, with the 29 U.S.C. § 158(a)(4) language italicized, provides as follows:

No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee [has commenced a proceeding under the AEA or testified in such proceeding].

42 U.S.C. § 5851(a).

Similarly, the Secretary of Labor can order a discriminating nuclear employer to abate its discrimination and to "reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment." 42 U.S.C. § 5851(b)(2)(B). In addition, the Secretary "may" order the violator "to provide compensatory damages to the complainant." *Ibid.* Neither the NLRB nor the Secretary, however, is authorized to award a complainant punitive damages. *Russell*, 356 U.S. at 646 (NLRB); *Pet. App. 21a* (Secretary).

Given Congress's express declaration that Section 210 of the ERA was modeled on the NLRA, as amended by the LMRA, and given the close similarity between the remedial provisions of Section 210 and the analogous remedial provisions relating to unfair labor practices, it must be presumed that in enacting Section 210, Congress did not intend to regulate employment discrimination in the nuclear field more pervasively than it had in the federal labor laws regulating employment in other industries affecting commerce. As this Court made abundantly clear in *Farmer* and related cases (see *supra* pages 11-15), neither the NLRA nor the LMRA evinces a congressional intent to preempt a cause of action for the intentional infliction of emotional distress. These cases make similarly clear that Congress did not intend such preemption in Section 210 of the ERA.<sup>15</sup>

<sup>15</sup> When Congress expressly models one remedial labor statute on another, this Court's interpretation of the one has consistently been informed by its decisions under the other. See, e.g., *Leedom v. Kyne*, 358 U.S. 184, 189-91 (1958) (whether NLRA extinguished jurisdiction to enforce statutory right or remedy to be decided under precedent of Railway Labor Act ["RLA"]); see also *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225, 1230 (1989) ("carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA").



**B. Preemption Of The State Claim Presented Would Impermissibly Eliminate Or Curtail A Remedy For The Victims Of Intentional Torts.**

*Silkwood* declined to infer from congressional silence an intent to preempt state law remedies for personal injuries from radiation because the Court found it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U.S. at 251. More recently, in reaffirming *Silkwood*, the Court reiterated its reluctance to infer the preemption of state law remedies, concluding that such remedies exert only "incidental regulatory pressure" on the federal interest in nuclear regulation. *Goodyear Atomic Corp.*, 108 S. Ct. at 1712. This reluctance extends not just to the elimination of a state remedy but also to the curtailment of such remedies. See *Laburnum*, 347 U.S. at 666-67. Thus, in *Russell*, 356 U.S. at 641-42, and in *Laburnum*, 347 U.S. at 663-64, this Court held that the NLRB's inability to award monetary relief (other than back pay) or punitive damages counseled against, rather than for, preemption of state-sanctioned causes of action permitting such awards.

The decisions below work precisely the sort of curtailment that this Court refused to countenance in *Silkwood*, *Russell*, and *Laburnum*. If Section 210 were to preempt state remedies for intentional infliction of emotional distress, petitioner would be deprived of a significant portion of damages available to her under state law, and other nuclear employees would be deprived of any remedy for the kind of "outrageous" misconduct alleged here. Petitioner would be deprived of punitive damages because the Secretary of Labor has no authority to award such damages. Pet. App. 21a. *Silkwood* precludes that result. Petitioner's right to compensatory damages would also be impermissibly diminished. Although Section 210 permits the Secretary of Labor to award compensatory damages to an aggrieved whistleblower, that award is purely discretionary. See 42 U.S.C. § 5851(b)

(2) (B) (the Secretary "may" order the employer to provide compensatory damages to the complainant); 29 C.F.R. § 24.6(b) (2) (the Secretary "may, where deemed appropriate, order the party charged to provide compensatory damages to the complainant"). *Russell* and *Laburnum* preclude that impact.

Some nuclear employees would suffer even greater deprivation. Section 210(g) makes the statutory remedy under Section 210(a)-(b) unavailable to an employee who has deliberately caused a violation of a nuclear safety requirement, even if the employer's retaliatory actions are unrelated to that violation. 42 U.S.C. § 5851(g). Preemption of state law remedies for intentional tortious conduct like the intentional infliction of emotional distress would leave such employees without any remedy, no matter what outrageous conduct (short of outright criminal conduct) their employer might inflict on them. There is no indication that Congress intended such a result; and any such intent is unlikely in a statute designed to "offer[] protection to employees." S. Rep. at 29, reprinted in 1978 U.S. Code Cong. & Admin. News at 7303.

**III. STATE REMEDIES FOR THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS NEITHER INTERFERE NOR CONFLICT WITH THE REMEDIES PROVIDED BY THE ERA.**

As demonstrated above, the state interest in providing protection against and redress for the intentional infliction of emotional distress lies at the periphery of the federal interest in prohibiting discrimination in the workplace. *Farmer*, 430 U.S. at 302. Moreover, Section 210 and its legislative history manifest no suggestion that federal protection for nuclear whistleblowers was to be "pervasive." See *supra* pages 13-19. Accordingly, the preemptive reach of Section 210 depends on "whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objec-



tives of the federal law." *Silkwood*, 464 U.S. at 256. Although the district court in this case recited the correct *Silkwood* preemption standard, its application of it was severely flawed.

**A. A State Remedy To Redress Tortious Conduct Does Not Interfere With The Section 210 Remedial Scheme Because The State Need Not Resolve Or Intrude On Issues Of Federal Law Or Policy.**

The district court found interference with the federal interest in this case because it concluded that all but one of English's factual allegations supporting her charge of intentional infliction of emotional distress concerned "terms, conditions, or privileges of employment" and therefore were essentially identical to allegations necessary to support a claim under the federal whistleblower statute. Pet. App. 18a, 28a. Because the lower court failed to focus on the correct factors in its analysis, it reached the wrong conclusion.

According to this Court, the potential for interference of state law with federal laws is at a minimum "where the particular rule of law sought to be invoked before another tribunal is so constructed and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297-98 (1971). A state rule of law is "constructed and administered" in the requisite fashion when the state claim at issue is not "identical" to the federal claim or "substantially dependent" on the application or interpretation of a federal statute, standard, or policy. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394-95 (1987).

In determining whether a state cause of action is identical to or "substantially dependent upon" federal law, a court must analyze the *legal* elements of the respective controversies—not the factual allegations used to support those legal propositions. *Farmer*, 430 U.S. at

305. If the state court controversy can be resolved without addressing or resolving an issue of federal law, disposition of the state claim cannot be said to interfere with the federal cause of action. *Ibid.* If resolution of the state and federal claims calls only for consideration of the same facts, the state claim does not interfere with the federal claim so as to warrant preemption of it. *Ibid.*; see *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877, 1883 (1988).

This Court held in *Farmer* that the respective controversies to be decided in a state claim of intentional infliction of emotional distress and a federal claim of discrimination in employment are sufficiently distinct to preclude interference with the federal scheme. 430 U.S. at 303-04. It so held because neither adjudicating forum would resolve legal issues that were the province of the other. *Id.* at 304-05. Because none of the legal issues in an intentional infliction of emotional distress claim would be part of a Section 210 discrimination proceeding—and vice versa—the claims are not identical.<sup>16</sup> For example, a Section 210 action would not require proof that a nuclear employer intentionally engaged in "outrageous" conduct or that a nuclear employee suffered "extreme" emotional distress as a result of that conduct. On the other hand, a state tort claim would not involve consideration of whether the plaintiff had commenced or otherwise participated in an enforcement action under the ERA or the AEA or had suffered discrimination in employment terms and conditions as a result of those efforts (see 42 U.S.C. § 5851(a)).

<sup>16</sup> This Court has also held that the tort of intentional infliction of emotional distress is legally separate and distinct from an arbitrable dispute "concerning rates of pay, rules, or working conditions" under the Railway Labor Act. *Atchison, T. & S. F. Ry. Co. v. Buell*, 480 U.S. 557, 563 (1987) (quoting 45 U.S.C. § 153 First (i)). Consequently, the Court held that a remedy for such outrageous conduct, if permitted by the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.*, would not be preempted by the primary jurisdiction of federal arbitration boards under the Railway Labor Act. 480 U.S. at 566-71.

Thus, even if a Section 210 claim and a state law cause of action for intentional infliction of emotional distress require the consideration of similar facts, the two controversies are legally distinct. Prosecution of the state claim, then, cannot be said to interfere with a federal interest and should not be preempted.<sup>17</sup> See *Farmer*, 430 U.S. at 305; *Lingle*, 108 S. Ct. at 1883.

**B. Recovery For Intentional Infliction Of Emotional Distress Does Not Conflict With The Provisions Of Section 210.**

In addition to its faulty "interference" analysis, the district court found three bases upon which English's claim for intentional infliction of emotional distress created a conflict with the remedial provisions of Section 210: the statute's "clean hands" provision, 42 U.S.C. § 5851(g); an omission from the statute of an allowance for punitive damages; and the short thirty- and ninety-day time limits for filing and adjudicating Section 210 claims, 42 U.S.C. § 5851(b)(1). Pet. App. 19a. In order for such conflicts to warrant preemption, however, they must be of such seriousness that "it is impossible to comply with both state and federal law" or "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248. Petitioner's state law tort claim presents no such difficulties.<sup>18</sup>

The district court's first concern was with Section 210's "clean hands" provision, which bars *any* federal relief to an employee who deliberately causes a violation

<sup>17</sup> In fact, a decision that Section 210 did preempt English's state law claim *would* constitute an obstacle to Congress's express purpose to extend additional protection to employees in the nuclear industry.

<sup>18</sup> Hypothetical conflicts between state and federal law are insufficient as a basis for preemption. *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1432 (1987). See *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978).

of an ERA or AEA requirement. 42 U.S.C. § 5851(g). As the court understood it, the provision was designed to deny Section 210 relief even to those nuclear facility workers who committed a violation "not even remotely related to that on which [the complainant] blew the whistle." Pet. App. 20a. The court concluded that it would be inconsistent to permit those expressly excluded from Section 210 relief by Congress to pursue a remedy under state tort law. *Id.* at 21a.

In reaching this conclusion, however, the district court overlooked the interrelationship between the "clean hands" limitation and the specific remedial duties of the Secretary of Labor under Section 210(b). If the Secretary determines that a complainant has suffered unlawful discrimination under Section 210(a), the Secretary "shall" order the violator to "reinstate the complainant to his former position." 42 U.S.C. § 5851(b)(2)(B). Thus, the purpose of the "clean hands" provision is to deny the remedy of *reinstatement* (with back pay) that might return a known safety violator to work with radioactive materials. This understandable limitation can have no bearing on the availability of a damages remedy for the legally distinct tort of the intentional infliction of emotional distress. State remedies for intentional torts in general and this tort in particular are restricted to recovery of damages; they do not include a remedy such as reinstatement. See *Belknap*, 463 U.S. at 510 (federal interest not implicated because state court cannot order reinstatement as remedy for intentional tort of misrepresentation); see also *supra* at 9 n.5. Thus, nothing a nuclear employee with "unclean hands" could hope to recover in an intentional tort suit could create an obstacle to the achievement of the congressional purpose behind Section 210(g).

The district court's second concern was the omission of any provision for punitive damages for a Section 210



complainant. Pet. App. 21a-22a.<sup>19</sup> Just last term, however, this Court reaffirmed the principle that "state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989). Further, there is no inconsistency between a statute designed to benefit employees and a state punitive measure against employers.

Moreover, as this Court has recognized, punitive damages have long been a part of traditional principles of state tort law. *Silkwood*, 464 U.S. at 255. Displacement through preemption of a State's punitive damages remedy will not be inferred simply because a particular congressional enactment is silent on the subject. *Id.* at 251. In permitting punitive damages in suits for intentional infliction of emotional distress, the State of North Carolina has made the judgment that those who engage in extreme and outrageous conduct must not only compensate their victims for their distress but should pay an additional sum to deter them and others from such conduct. Preemption of petitioner's claim would eliminate any state punishment for those who commit outrageous and intentional misconduct, without offering a federal substitute to satisfy the punitive function. For just such reasons, this Court has held that the NLRB's lack of authority to award punitive damages militates for, rather than against, the availability of this "well-established form of relief" in state law cases. *Russell*, 356 U.S. at 646.

Finally, the district court found a potential conflict in Section 210's strict thirty-day time limit for bringing discrimination charges. The court assumed that this provision was intended to promote a prompt filing of such claims; prompt filing, in turn, would lead to prompt reinstatement of the injured employee and to the prompt discovery of nuclear hazards. Pet. App. 22a. As the

<sup>19</sup> Section 210 does, however, provide for an exemplary damages award to the Secretary of Labor if the Secretary successfully sues to enforce an order under the statute. 42 U.S.C. § 5851(d).

court saw it, allowing a claim like English's to languish for the longer state limitations period would compromise the federal interest in fast correction of nuclear safety violations. *Ibid.*

The district court's concerns are based on a serious misperception of the nature of Section 210. First, because reinstatement is not one of the available remedies for intentional infliction of emotional distress, an aggrieved whistleblower has every possible incentive to pursue reinstatement under Section 210. Second, a retaliation claim under Section 210 does not trigger a report of hazardous conditions to the NRC. Rather, the report of such hazardous conditions—and subsequent retaliation for such reporting—triggers the remedial provisions of Section 210. Section 210's time limits, then, have no direct relation to the promptness with which nuclear hazards are reported.

The existence of differing time schemes for pursuing a Section 210 claim and an action for infliction of emotional distress therefore constitutes a distinction without significance—not a conflict. State intentional tort claims have traditionally coexisted with federal administrative schemes with shorter limitations periods. See, e.g., 29 U.S.C. § 160(b) (six-month limitations period for filing unfair labor practice charges with the NLRB).<sup>20</sup>

**C. The Courts Are Amply Equipped To Eliminate Any Incidental Effects Of A State Remedy For Intentional Infliction Of Emotional Distress On The Federal Interests Manifested In Section 210.**

This Court has repeatedly reaffirmed its faith in the ability of state and federal courts to administer common law remedies and to fashion their procedural rules in ways that are respectful of federal administrative concerns. In *Linn*, for example, the Court indicated its con-

<sup>20</sup> Moreover, as discussed below, the shorter federal limitations periods in Section 210 can actually be expected to prevent interference with the federal scheme. See *infra* page 28.



vidence that a court hearing a defamation claim under state law could, through jury instructions, ensure that speech that was protected under federal law in the context of a labor dispute would be distinguished from actionable malicious libel under state law. 383 U.S. at 64-65. *Farmer* similarly recognized that a jury instruction could ensure that damages awarded for the intentional infliction of emotional distress would not include damages traceable to employment discrimination—a matter in the preserve of the NLRB. 430 U.S. at 306. The Court expressed faith that the courts would meet their “responsibility in cases of this kind to assure that the damages awarded are not excessive.” *Ibid.*

There is no reason to believe that federal and state courts in North Carolina and elsewhere do not have the tools or will not exercise their responsibility to administer remedies for intentional infliction of emotional distress so as to remove any incidental effects on or conflict with Section 210 proceedings. Evidentiary rulings and instructions to the jury can ensure that a state recovery is not based solely on employment discrimination against a nuclear whistleblower. See *Farmer*, 430 U.S. at 306; *Restatement (Second) of Torts* § 46(1) comment h (the court decides as a matter of law whether conduct is sufficiently “outrageous”). Moreover, the shorter limitations periods for the federal action means that the federal administrative adjudicator will almost invariably proceed first, thereby allowing courts to apply rules of issue preclusion to bar relitigation of distinctly federal issues in state claims. See *University of Tennessee v. Elliot*, 478 U.S. 788, 797 (1986) (“[I]t is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity”). Thus, it is well within the traditional powers exercised by courts to ensure that adjudication of claims for the intentional infliction of emotional distress will not have even incidental effects on the federal interest in protecting nuclear whistleblowers.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

STEVEN K. HOFFMAN  
BRADLEY M. CAMPBELL  
ROGOVIN, HUGUE & SCHILLER  
1250 24th Street, N.W.  
Washington, D.C. 20037  
(202) 467-8300  
*Of Counsel*

March 8, 1990

BENNA RUTH SOLOMON  
Chief Counsel  
STATE AND LOCAL  
LEGAL CENTER  
444 North Capitol St., N.W.  
Suite 349  
Washington, D.C. 20001  
(202) 638-1445  
*Counsel of Record for the*  
*Amici Curiae*

**MAR 8 1990**

JOSEPH F. SPANIOL, JR.  
CLERK

No. 89-152

In The  
**Supreme Court of the United States**  
October Term, 1989

---

VERA M. ENGLISH,

*Petitioner,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

---

On Writ Of Certiorari To The United States Court  
Of Appeals For The Fourth Circuit

---

BRIEF OF AMICUS CURIAE  
NATIONAL WHISTLEBLOWER CENTER  
IN SUPPORT OF PETITIONER

---

STEPHEN M. KOHN  
MICHAEL D. KOHN  
KOHN, KOHN & COLAPINTO, P.C.  
517 Florida Ave., N.W.  
Washington, D.C. 20001  
(202) 234-4663  
*Counsel for Amicus Curiae*  
*National Whistleblower Center*

## TABLE OF CONTENTS

	Page
Table of Contents .....	i
Table of Authorities .....	ii
Statement of Interest of Amicus Curiae National Whistleblower Center .....	1
Summary of Argument .....	1
Argument .....	2
I. Congress Did Not Intend Sec. 210 of the Energy Reorganization Act to pre-empt State Tort Claims for Employment Discrimination.....	2
II. Vera English's Tort Claim is Not Subject to Fed- eral Pre-emption Under Supreme Court Prece- dent.....	4
III. No Conflict Exists Between Sec. 210 and State Tort Law .....	6
IV. The District Court Case of " <i>Snow v. Bechtel</i> " Does Not Provide Additional Grounds for Justi- fying Pre-emption.....	10
Conclusion .....	13



## TABLE OF AUTHORITIES

Page

## SUPREME COURT CASES

<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974) . . . . .	4
<i>Atchison, Topeka &amp; Santa Fe Railway Co. v. Buell</i> , 480 U.S. 557 (1987) . . . . .	4
<i>Barrentine v. Arkansas-Best Freight System, Inc.</i> , 450 U.S. 728 (1981) . . . . .	4
<i>California Coastal Commission v. Granite Rock Co.</i> , 480 U.S. 572 (1987) . . . . .	6, 7
<i>Colorado Anti-Discrimination Commission v. Continental Air Lines</i> , 372 U.S. 714 (1963) . . . . .	4
<i>Lingle v. Norge Division of Magic Chef, Inc.</i> , 486 U.S. 399 (1988) . . . . .	3, 4, 5
<i>McDonald v. City of West Branch</i> , 466 U.S. 284 (.984) . . . . .	4
<i>Metropolitan Life Ins. Co. v. Massachusetts</i> , 471 U.S. 724 (1985) . . . . .	4
<i>Mt. Healthy City School District v. Doyle</i> , 429 U.S. 274 (1977) . . . . .	7, 8
<i>NLRB v. Scrivener</i> , 405 U.S. 117 (1972) . . . . .	11
<i>NLRB v. Transportation Management</i> , 462 U.S. 393 (1983) . . . . .	8
<i>Pacific Gas &amp; Electric Co. v. State Energy Resources Commission</i> , 461 U.S. 190 (1983) . . . . .	4, 5
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1985) . . . . .	5
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) . . . . .	8

## TABLE OF AUTHORITIES - Continued

Page

## OTHER FEDERAL CASES

<i>Commonwealth-Lord Joint Venture v. Donovan</i> , 724 F.2d 67 (7th Cir. 1983) . . . . .	12
<i>Deford v. Secretary of Labor</i> , 700 F.2d 281 (6th Cir. 1983) . . . . .	9, 11
<i>Snow v. Bechtel Const. Inc.</i> , 647 F.Supp. 1514 (C.D. Cal. 1986) . . . . .	2, 10, 11

## ADMINISTRATIVE DECISIONS

<i>Cox v. Radiology Consulting Associates, Inc.</i> , 86-ERA-17, Recommended Decision and Order of Department of Labor Administrative Law Judge (8/22/86), adopted by the Secretary of Labor (11/6/86) . . . . .	10
<i>Landers v. Commonwealth-Lord Joint Venture</i> , 83-ERA-5, slip op. of Administrative Law Judge (5/11/83), adopted by Secretary of Labor (Sept. 9, 1983) . . . . .	9, 12

## OTHER CASES

<i>Belts v. Stroehmann Bros.</i> , 415 A.2d 1280 (Pa. Super. 1986) . . . . .	8
<i>Eckstein v. Kuhn</i> , 408 N.W. 2d 131 (Mich. App. 1987) . . . . .	8
<i>McClung v. Marion Co.</i> , 360 S.E. 2d 221 (W.Va. 1987) . . . . .	8
<i>Pugh v. See's Candies, Inc.</i> , 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) . . . . .	8

## TABLE OF AUTHORITIES - Continued

	Page
STATUTES	
Clean Air Act, 42 U.S.C. 7416.....	3
Clean Air Act, 42 U.S.C. 7622.....	2
Federal Water Pollution Control Act, 33 U.S.C. 1367 .....	2
Federal Water Pollution Control Act, 33 U.S.C. 1370 .....	3
Labor Management Relations Act, 29 U.S.C. 185.....	2
Mine Health and Safety Act of 1969, 30 U.S.C. 820(b) .....	2
Mine Health and Safety Act of 1969, 30 U.S.C. 955 .....	3
National Labor Relations Act, 29 U.S.C. 158(a)(4).....	3
Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851.....	<i>passim</i>
OTHER AUTHORITIES	
134 Congressional Record 1451 (Feb. 23, 1988).....	10
Fidell, "Federal Protection of Private Sector Health and Safety Whistleblowers: A Report to the Administrative Conference of the United States." .....	10
Kohn, <i>Protecting Environmental and Nuclear Whis- tleblowers</i> , (Nuclear Information and Resource Services, Wash., D.C. 1985) .....	9, 12
1977 U.S. Code Cong. & Ad. News 1405 .....	11
1978 U.S. Code Cong. & Ad. News 7303 .....	3, 11

STATEMENT OF INTEREST OF AMICUS CURIAE  
NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center is a project of Northwest Environmental Advocates (NWEA), a non-profit organization formed in 1969. The Center was created in 1988 in response to the need to protect whistleblowers who could not find representation from existing public interest organizations and attorneys. The Center seeks to protect employees who made safety related disclosures at nuclear power facilities from retaliation. Since its inception, the Center has provided assistance to whistleblowers throughout the country including employees at the following nuclear power plants: Palo Verde in Arizona, Nine Mile Point in New York, Plant Vogtle in Georgia, the Savannah River Project in South Carolina, Grand Gulf in Mississippi, Comanche Peak in Texas, and Peach Bottom in Pennsylvania.

The disposition of this case will effect the legal rights of other employee whistleblowers at nuclear power facilities.

Counsel for Petitioner Vera M. English and Respondent General Electric Company have consented to the filing of this *amicus curiae* brief.

---

SUMMARY OF ARGUMENT

- I. The Legislative History of Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, indicates that Section 210 was modeled after other laws to which the doctrine of federal pre-emption does not apply.

- II. Supreme Court precedent regarding the application of federal pre-emption in employment discrimination cases mandates that Vera English's tort claim not be dismissed due to pre-emption.
- III. The District Court in *English* incorrectly found that the state tort of intentional infliction of emotional distress could conflict with Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851.
- IV. Section 210 is not primarily a health and safety statute, and the reasoning of the District Court in *Snow v. Bechtel* does not justify pre-emption.

---

### ARGUMENT

#### I. Congress did not intend Section 210 of the Energy Reorganization Act to pre-empt state tort claims for employment discrimination

In enacting Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, Congress did not intend to pre-empt employees at nuclear power facilities from filing state tort claims (such as intentional infliction of emotional distress) against their employer.

Congress modeled Section 210 after four anti-retaliation employment discrimination laws: the employee protection provisions of the Clean Air Act, 42 U.S.C. 7622; the Federal Water Pollution Control Act, 33 U.S.C. 1367; Mine Health and Safety Act of 1969, 30 U.S.C. 820(b) and the National Labor Management Act [i.e., the Labor Management Relations Act, 29 U.S.C. 185, and the National

Labor Relations Act, 29 U.S.C. 158(a)(4)]. The Senate Report for Section 210 states:

This amendment is substantially identical to provisions in the Clean Air Act and Federal Water Pollution Control Act. The legislative history of those acts indicated that such provisions were patterned after the National Labor Management Act and a similar provision in Public Law 91-173 relating to the health and safety of the Nation's coal miners.

1978 U.S. Code Cong. & Ad. News 7303.

Congress intended that the rights afforded employee whistleblowers who disclose information concerning potential violations of the Atomic Energy Act would be equivalent to the rights afforded employees who disclose information, under, for example, the Clean Air Act.

When Congress adopted the Clean Air Act, the Water Pollution Control Act and the Mine Health and Safety Act, they *explicitly* allowed states to enact stronger protections than the federal standard. See, Clean Air Act, 42 U.S.C. 7416, Water Pollution Control Act, 33 U.S.C. 1370 and Mine Health and Safety Act, 30 U.S.C. 955. Similarly, in 1988 this Court declined to judicially pre-empt state retaliatory discharge tort claims under the Labor Management Relations Act. See, e.g. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).

None of the models used by Congress in enacting Section 210 provided for the pre-emption of state wrongful discharge or employment tort law. Congress modeled the statutory provisions of Section 210 on employee protection laws which did not provide for pre-emption of state labor law. Congress did not intend Section 210 to



pre-empt state employment law. Pre-emption is inappropriate in circumstances where Congress did not intend to pre-empt such state action. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985).

## II. Vera English's tort claim is not subject to Federal pre-emption under Supreme Court Precedent

This Court has long recognized that federal and state remedies in employment discrimination or tort actions can mutually co-exist even if the state and federal remedy arises from an identical core of operative facts. See, e.g. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Atchinson, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987); *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963). The fact that an employment discrimination claim or state tort claim may arise in the area of atomic energy is not sufficient to depart from the standard rule.

Specifically, the scope of federal pre-emption under the Atomic Energy Act and the Energy Reorganization Act is limited. The U.S. Supreme Court explicated this limitation in its holding in *Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190 (1983):

... Congress, in passing the 1954 Act [the Atomic Energy Act] and in subsequently amending it, intended that the Federal Government should regulate the radiological safety aspect involved in the construction and operation of a nuclear

power plant, but that the states retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.

461 U.S. at 205 (emphasis added).

Traditional "state concerns" were not subject to federal pre-emption.<sup>1</sup> In *Pacific Gas & Electric*, the Court held that states could regulate the economic issues of atomic energy – even though such regulation could have an effect on the safety of nuclear plant operations.

The *Silkwood* case is consistent with *Pacific Gas & Electric*. *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1985). Overlap between federal safety regulation and state tort liability can exist (in *Silkwood*, the NRC had jurisdiction to review and fine the utility for the very infraction which laid the basis for the state tort suit). The Court recognized that utilities may be open to both civil fines for safety infractions leveled by the NRC and punitive damages under traditional state tort laws. The mere fact that such overlap could exist was not grounds for finding pre-emption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984) ("Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.").

<sup>1</sup> Unquestionably, labor relations is an area of traditional state concern. See, e.g. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 412 (1988) ("the establishment of labor standards falls within the traditional police powers of the State.").

### III. No conflict exists between Section 210 and state tort claims

In the proceedings below, the District Court found pre-emption, reasoning that there was an "irreconcilable conflict between the federal and state standards" concerning employee relations at commercial nuclear facilities and that this conflict would "frustrate the objectives of federal law." Appendix to petition for writ of certiorari pp. 19a. In making these findings the lower court misapplied the law on federal pre-emption.

The District Court reviewed the language of Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, and articulated hypothetical circumstances in which Section 210 and state law may conflict. Nothing on the record supported a finding, at the summary judgment stage, that such conflicts actually existed. Instead, based on the hypothetical possibility that conflicts may possibly exist between the state and federal law the lower court found pre-emption. This was an error of law.

In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), this Court articulated the standard for applying the hypothetical reasoning to pre-emption cases:

To defeat Granite Rock's [Granite Rock Co. alleged that the actions of the California Coastal Commission were pre-empted] facial challenge, the Coastal Commission needed merely to identify a possible set of permit conditions not in conflict with federal law."

480 U.S. at 573 (emphasis added).

In *California Coastal Commission*, this Court did not find pre-emption based on hypothetical circumstances. To the contrary, the state was given the right to "identify a possible" set of "conditions not in conflict with federal law." *California Coastal Commission*, supra, 480 U.S. at 593.

When the alleged "conflicts" between Section 210 and state tort law are scrutinized, it is clear that no conflict sufficient to justify pre-emption actually exists. The District Court erred when it attempted to use subsection (g) of Section 210, 42 U.S.C. 5851(g), as proof that Section 210 and state tort remedies "conflict." Likewise, the District Court erred when it found that the 30 day statute of limitations under Section 210 created a conflict with state tort remedies.

Subsection (g) of Section 210 states that relief is not available where an employee "acting without direction from his or her employer, deliberately causes a violation of this chapter . . . ." But, there is no support for the proposition that state wrongful discharge or tort law could result in the reinstatement of an employee who in fact was guilty of a true subsection (g) violation. No federal pre-emption exists where, as here, the common law does not, in fact, conflict with federal law. A federal court cannot simply manufacture state law and then find that this manufactured law demonstrates federal pre-emption exists. Moreover, the lower court simply ignored the case precedent under both federal and state law that allows an employer to discharge an employee for *valid* reasons – even if the discharge was caused, in part, for retaliatory reasons. See, *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977).



Essentially, subsection (g) merely codifies the landmark *Mt. Healthy* Supreme Court decision. Under *Mt. Healthy*, even if an employee can make out a prima facie case (i.e., a violation of subsection (a) of Section 210), the employee still loses if the employer successfully articulates a legitimate nondiscriminatory reason for the discharge. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287. Employee conduct violative of subsection (g) would constitute a legitimate nondiscriminatory reason for the discharge. The *Mt. Healthy* analysis has been uniformly followed by state and federal courts. See e.g., *NLRB v. Transportation Management*, 462 U.S. 393, 403 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, (1981); *Belts v. Stroehmann Bros.*, 415 A.2d 1280, 1281 (Pa. Super. 1986); *Eckstein v. Kuhn*, 408 N.W. 2d 131 (Mich. App. 1987); *McClurg v. Marion Co.*, 360 S.E. 2d 221 (W.Va. 1987). For example, in *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 927-28 (1981), a California court, applying state wrongful discharge law, warned that "care must be taken . . . not to interfere with the legitimate exercise of managerial discretion . . ." It is only reasonable to interpret state tort suits under North Carolina law consistent with other federal and state courts which have uniformly followed *Mt. Healthy* and its progeny.

The "timeliness" issue raised by the District Court is another red herring. The lower court hypothesized that one of the reasons Section 210 had expedited time limitations was to ensure prompt resolution of *safety problems*. However, the District Court failed to distinguish between a complaint filed before the U.S. Department of Labor

(DOL) and a complaint filed with the U.S. Nuclear Regulatory Commission (NRC). Specifically, a Section 210 complaint does not need to allege any safety violation by an employer. *Deford v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). Also see, Kohn, *Protecting Environmental and Nuclear Whistleblowers*, p. 29 (Nuclear Information Resource Service, Wash., D.C. 1985), quoting *Landers v. Commonwealth-Lord Joint Venture*, 83-ERA-5, slip op. of Department of Labor Administrative Law Judge, p. 3 (5/11/83), adopted by Secretary of Labor (9/9/83). The complaint need not contain any evidence that an NRC regulation was violated, and at trial the veracity of any safety allegation is never an issue. It is well settled that whether an employer in fact violated any NRC regulations is irrelevant in a Section 210 proceeding, and the DOL has no jurisdiction over these matters. See Kohn, *Protecting Environmental and Nuclear Whistleblowers*, at pp. 28-30 (Nuclear Information and Resource Service, Wash., D.C. 1985). Filing a complaint with the DOL under Section 210 will not, in and of itself, lead to any investigation or resolution of the underlying employee allegations. Section 210 did not, directly or indirectly, cede any of the NRC's jurisdiction over nuclear safety to the DOL. Although the DOL may share information with the NRC, a proceeding under Section 210 is not an NRC proceeding.

Nothing in Section 210 establishes any statute of limitations for an employee to file a *safety* complaint with the NRC. Section 210 does not require an employee to alert the NRC within 30 days of identifying a potential safety violation, and often retaliatory discharge occurs months or years after the reported safety disclosure. See, Part IV of this Brief, *Infra*.



A 30 day statute of limitations is not an aspect of the law which has facilitated the exposure of health and safety problems to the NRC. In a thorough report by the U.S. Administrative Conference, the 30-day statute of limitations was criticized as "unreasonable" and the unfortunate fact that numerous cases are dismissed by the DOL (both at the investigatory and the adjudicatory stages) due to failure to comply with the statute of limitations was documented. Fidell, "Federal Protection of Private Sector Health and Safety Whistleblowers: A Report to the Administrative Conference of the United States," reprinted at 134 *Cong. Record* 1451, 1454 (February 23, 1988). Likewise, the U.S. Department of Labor has recognized the unfortunate hardship often caused employees by the 30 day statute of limitation:

"The 30 day time limitation for filing claims is short and may result in significant numbers of well-founded claims not being investigated. Moreover, it may thwart the purpose of the ERA by diminishing the protection of employees . . . ."

*Cox v. Radiology Consulting Associates, Inc.*, 86-ERA-17. Recommend Decision and Order of Department of Labor Administrative Law Judge (8/22/86), adopted by the Secretary of Labor (11/6/86).

Allowing employees to file employment discrimination claims under state law after the 30 day statute of limitations under Section 210 has expired will facilitate the Congressional purpose of Section 210.

#### IV. District Court Case "*Snow v. Bechtel*" does not provide additional grounds for justifying pre-emption

The lower court in *English* correctly found that "employee protection" was the "paramount" purpose behind

Section 210 of the ERA. This holding differed from a decision by the U.S. District Court for the Central District of California, *Snow v. Bechtel Const. Inc.*, 647 F.Supp. 1514 (C.D. Cal. 1986), which held that Section 210 pre-empted state wrongful discharge law because "nuclear safety" regulation is "pre-empted by the federal regulatory subpoena." *Id.*, 647 F.Supp. at 1517.

The lower court correctly refused to follow the reasoning of *Snow*. The *Snow* court ignored the statute's legislative history and the rulings of the U.S. Secretary of Labor in reaching its decision. The legislative history of Section 210 states that it was modeled directly after similar employee protection laws found in the Clean Air Act (CAA) and the Federal Water Pollution Act (FWPCA). 1978 U.S. Code Cong. & Ad. News 7303. Significantly, the legislative history of Section 210's models explicitly did *not* require that the whistleblower's information be health or safety significant. The laws were designed to protect the workers' right to express concerns - even if those concerns were found to have no relevance to safety. In relevant part the legislative history of the Clean Air Act's employee protection provision stated: "Moreover, as in the Safe Drinking Water Act and the Federal Water Pollution Act, the employer would not have to be proven to be in violation of the Clean Air Act requirement in order for this section to protect the employee's action." 1977 U.S. Code Cong. & Ad. News 1405.

Section 210 has been interpreted as not requiring that any of the employee's allegations be proven or even "unique" in their revelations. *Deford v. Secretary of Labor*, 700 F.2d 281, 286, (6th Cir. 1983), accord, *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). The Secretary of Labor

has repeatedly held that the legitimacy of the employee safety allegations is legally irrelevant, and that the U.S. Department of Labor has no jurisdiction to decide safety issues. According to one such Department of Labor ruling:

"However, it is clear that this office does not have jurisdiction to decide any issues relative to the quality of the construction work in question. Those questions are within the province of other federal regulatory agencies. Therefore, any references to quality in this Decision and Order are not to be construed in any manner as finding in that regard."

*Landers v. Commonwealth-Lord Joint Venture*, 83-ERA-5, slip op. of ALJ at 3 (5/11/83), adopted by Secretary of Labor (Sept. 9, 1983); stay denied, *Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67 (7th Cir. 1983).

The veracity of an employee's safety concerns are irrelevant in a Section 210 case. See, Kohn, *Protecting Environmental and Nuclear Whistleblowers*, pp. 28-30. Section 210 is an employee protection statute.

---

## CONCLUSION

For the above-mentioned reasons, this Court should find that Section 210 of the Energy Reorganization Act does not pre-empt employees who work at nuclear facilities the right to proceed under state law with a tort claim for intentional infliction of emotional distress.

Respectfully submitted,

STEPHEN M. KOHN  
MICHAEL D. KOHN

KOHN, KOHN & COLAPINTO, P.C.  
517 Florida Ave., N.W.  
Washington, D.C. 20001  
(202) 234-4663

*Counsel for Amicus Curiae*  
*National Whistleblower Center*

March 8, 1990

15  
No. 89-152

FILED

APR 12 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

VERA M. ENGLISH,  
v. *Petitioner,*

GENERAL ELECTRIC COMPANY,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

**BRIEF OF THE NUCLEAR MANAGEMENT  
AND RESOURCES COUNCIL, INC.  
AS AMICUS CURIAE SUPPORTING RESPONDENT**

NICHOLAS S. REYNOLDS \*  
RICHARD K. WALKER  
DONN C. MEINDERTSMA  
BISHOP, COOK, PURCELL  
& REYNOLDS  
1400 L Street, N.W.  
Washington, D.C. 20005-3502  
(202) 371-5700

*Counsel for Amicus Curiae  
Nuclear Management and  
Resources Council, Inc.*

\* Counsel of Record



## **QUESTION PRESENTED**

Whether Section 210 of the Energy Reorganization Act, which provides a comprehensive federal administrative remedy for employees at nuclear facilities as an integral part of the federal government's program to ensure safety in the operations of those facilities, preempts state law claims for intentional infliction of emotional distress arising out of alleged discrimination in the terms and conditions of employment in retaliation for reporting a safety violation at a nuclear facility that is fully compensable under Section 210.

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	v
INTEREST OF THE AMICUS CURIAE .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
I. CONGRESS INTENDED SECTION 210 OF THE ENERGY REORGANIZATION ACT TO BE THE EXCLUSIVE REMEDY FOR EM- PLOYEES IN THE NUCLEAR INDUSTRY WHO CLAIM THAT THEY HAVE BEEN DIS- CRIMINATED AGAINST FOR RAISING NU- CLEAR SAFETY CONCERNS .....	6
A. Section 210 Must Be Read <i>In Pari Materia</i> With Other Provisions Of The Comprehen- sive Federal Regulatory Regime Governing The Nuclear Industry, And When So Read It Provides An Exclusive Federal Remedy For Allegedly Retaliatory Acts Motivated By An Employee's Raising Nuclear Safety Concerns .....	6
B. This Court's Decisions In <i>Pacific Gas &amp; Elec-</i> <tric <i="" and="" co.="">Silkwood v. Kerr-McGee Corp.            Compel The Conclusion That The States            Have No Authority To Regulate Conduct            Such As That Alleged In Petitioner's            Complaint .....</tric>	12
II. PETITIONER'S CLAIMS ARE PREEMPTED FOR THE FURTHER REASON THAT THE APPLICATION OF STATE LAW TO HER ALLEGATIONS OF RETALIATION WOULD STAND AS AN OBSTACLE TO, AND FRUS- TRATE, FULL REALIZATION OF THE OBJECTIVES OF FEDERAL LAW GOVERN- ING THE REGULATION OF NUCLEAR FACILITIES .....	17

## TABLE OF CONTENTS—Continued

	Page
III. THE DECISIONS OF THE COURTS BELOW ARE CONSISTENT WITH THE PREEMP- TION PRINCIPLES ARTICULATED BY THIS COURT IN CASES ARISING UNDER THE LABOR MANAGEMENT RELATIONS ACT .....	23
CONCLUSION .....	30

## TABLE OF AUTHORITIES

Cases:	Page
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985) .....	28
<i>Amalgamated Ass'n of Motor Coach Emp' yees v. Lockridge</i> , 403 U.S. 274 (1971) .....	25, 27
<i>Atkinson v. Gates, McDonald &amp; Co.</i> , 838 F.2d 808 (5th Cir. 1988) .....	29
<i>Belknap v. Hale</i> , 463 U.S. 491 (1983) .....	26, 27
<i>Binkley v. Loughran</i> , 714 F. Supp. 768 (M.D.N.C. 1988) .....	29
<i>Brown &amp; Root, Inc. v. Donovan</i> , 747 F.2d 1029 (5th Cir. 1984) .....	20
<i>Brown v. General Servs. Admin.</i> , 425 U.S. 820 (1976) .....	20
<i>Commonwealth Edison Co. v. Pollution Control Bd.</i> , 5 Ill. App. 3d 800, 284 N.E.2d 342 (1972) .....	11
<i>Crawford Fitting Co. v. J.T. Gibbons, Inc.</i> , 482 U.S. 437 (1987) .....	9
<i>DeFord v. Secretary of Labor</i> , 700 F.2d 281 (6th Cir. 1983) .....	27
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982) .....	20
<i>Erlenbaugh v. United States</i> , 409 U.S. 239 (1972) ..	10
<i>Farmer v. United Bhd. of Carpenters</i> , 430 U.S. 290 (1977) .....	25, 26, 27, 28, 29
<i>Great American Fed. Sav. &amp; Loan Ass'n v. Novotny</i> , 442 U.S. 366 (1979) .....	20
<i>Haig v. Agee</i> , 453 U.S. 280 (1981) .....	9
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941) .....	17
<i>International Ass'n of Machinists v. Gonzales</i> , 356 U.S. 617 (1958) .....	26
<i>International Paper Co. v. Oulette</i> , 479 U.S. 481 (1987) .....	17
<i>International Union, United Auto. Workers v. Russell</i> , 356 U.S. 634 (1958) .....	26, 27
<i>Jackson v. Southern Cal. Gas Co.</i> , 881 F.2d 638 (9th Cir. 1989) .....	29
<i>Kansas Gas &amp; Elec. Co. v. Brock</i> , 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986) .....	18, 19



## TABLE OF AUTHORITIES—Continued

	Page
<i>Lehman v. Morrissey</i> , 779 F.2d 526 (9th Cir. 1985) (per curiam) .....	29
<i>Lingle v. Norge Div. of Magic Chef, Inc.</i> , 486 U.S. 399 (1988) .....	27, 28
<i>Linn v. United Plant Guard Workers of America, Local 114</i> , 383 U.S. 53 (1966) .....	26, 27
<i>Masters v. Daniel Int'l Corp.</i> , 895 F.2d 1295 (10th Cir. 1990) .....	19
<i>Mayon v. Southern Pac. Transp. Co.</i> , 805 F.2d 1250 (5th Cir. 1986) .....	29
<i>Norman v. Niagara Mohawk Power Corp.</i> , 873 F.2d 634 (2d Cir. 1989) .....	25, 29
<i>Northern Natural Gas Co. v. State Corp. Comm'n</i> , 372 U.S. 84 (1963) .....	17
<i>Northern States Power Co. v. Minnesota</i> , 447 F.2d 1143 (8th Cir. 1971), <i>aff'd mem.</i> , 405 U.S. 1035 (1972) .....	10
<i>Pacific Gas &amp; Elec. Co. v. State Energy Resources Conservation &amp; Dev. Comm'n</i> , 461 U.S. 190 (1983) .....	4, 7, 8, 12, 13, 16, 17
<i>Pane v. RCA Corp.</i> , 868 F.2d 631 (3d Cir. 1989) .....	29
<i>Perez v. Campbell</i> , 402 U.S. 637 (1971) .....	17
<i>Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.</i> , 485 U.S. 495 (1988) .....	22
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) .....	12
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236 (1959) .....	23, 24, 25, 27, 28, 29, 30
<i>Schneidewind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988) .....	17, 22
<i>Sears, Roebuck &amp; Co. v. San Diego County Dist. Council of Carpenters</i> , 436 U.S. 180 (1978) .....	23
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) .....	4, 13, 14, 15, 16
<i>Smith v. Wade</i> , 461 U.S. 30 (1983) .....	21
<i>State of N.J., Department of Env'tl. Protection v. Jersey Cent. Power &amp; Light Co.</i> , 60 N.J. 102, 351 A.2d 337 (1976) .....	10
<i>United Constr. Workers v. Laburnum Constr. Co.</i> , 347 U.S. 656 (1954) .....	26, 27

## TABLE OF AUTHORITIES—Continued

	Page
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967) .....	26
<i>Wisconsin Dep't of Indus. v. Gould, Inc.</i> , 475 U.S. 282 (1986) .....	21
Administrative Decisions:	
<i>DeFord v. Tennessee Valley Auth.</i> , Case No. 81-ERA-1 (Secretary's Order on Remand) (Apr. 30, 1984) .....	27
<i>In re General Elec. Co.</i> (Wilmington, NC Facility), DD-89-1, 29 N.R.C. 325 (1989) .....	21
<i>In re Tennessee Valley Auth.</i> , EA 86-093 (July 10, 1986) .....	21
<i>In re Toledo Edison Co.</i> , EA 88-234 (Nov. 21, 1988) .....	21
Statutes and Regulations:	
Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1946) .....	7
Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 <i>et seq.</i> .....	6
§ 53, 42 U.S.C. § 2073 .....	8
§ 161, 42 U.S.C. § 2201 .....	19
§ 234, 42 U.S.C. § 2282 .....	21
§ 271, 42 U.S.C. § 2018 .....	7, 16
§ 274, 42 U.S.C. § 2021 .....	7, 8, 11
§ 274(b) (1), 42 U.S.C. § 2021(b) (4) .....	8
§ 274(c), 42 U.S.C. § 2021(c) .....	8
§ 274(c) (1), 42 U.S.C. § 2021(c) (1) .....	9
§ 274(k), 42 U.S.C. § 2021(k) .....	8
Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 <i>et seq.</i> .....	6, 9
§ 210, 42 U.S.C. § 5851 .....	<i>passim</i>
§ 210(b) (1), 42 U.S.C. § 5851(b) (1) .....	18
§ 210(b) (2), 42 U.S.C. § 5851(b) (2) .....	18
§ 210(b) (2) (B), 42 U.S.C. § 5851(b) (2) (B) .....	27
§ 210(g), 42 U.S.C. § 5851(g) .....	5, 21, 22, 23
Labor Management Relations Act of 1947, 29 U.S.C. §§ 141 <i>et seq.</i> .....	5, 24
§ 301, 29 U.S.C. § 185 .....	27, 28

### TABLE OF AUTHORITIES—Continued

	Page
National Labor Relations Act of 1935 .....	23
§§ 7, 8, 29 U.S.C. §§ 157, 158 .....	24
10 C.F.R. Part 2, App. C (1989) .....	21
10 C.F.R. § 2.206 (1989) .....	3
10 C.F.R. § 19.16(c) (superseded) .....	24
10 C.F.R. § 19.20 (1989) .....	19
10 C.F.R. § 30.7 (1989) .....	19
10 C.F.R. § 40.7 (1989) .....	19
10 C.F.R. § 50.7 (1989) .....	19
10 C.F.R. § 60.9 (1989) .....	19
10 C.F.R. Part 70 (1989) .....	8
10 C.F.R. § 70.7 (1989) .....	19, 21, 24
10 C.F.R. § 72.10 (1989) .....	19
Miscellaneous:	
124 Cong. Rec. 29771 (1978) .....	9, 25
124 Cong. Rec. 29785-87 (1978) .....	11
124 Cong. Rec. 37545, 38230 (1978) .....	11
124 Cong. Rec. 38239, 37526 (1978) .....	11
38 Fed. Reg. 22217 (1973) .....	24
47 Fed. Reg. 30452 (1982) .....	24
Easterbrook, <i>Statutes' Domain</i> , 50 U. Chi. L. Rev. 533 (1983) .....	20
H.R. 13650, 95th Cong., 2d Sess. (1978) .....	11
H.R. Rep. No. 1796, 95th Cong., 2d Sess. (1978), <i>reprinted in</i> 1978 U.S. Code Cong. & Admin. News 7304 .....	11
Memorandum of Understanding Between NRC and Department of Labor; Employee Protection, 47 Fed. Reg. 54585 (1982) .....	18, 19
S. 2584, 95th Cong., 2d Sess. (1978) .....	11

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-152

VERA M. ENGLISH,  
v. *Petitioner,*

GENERAL ELECTRIC COMPANY,  
*Respondent.*

**On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit**

**BRIEF OF THE NUCLEAR MANAGEMENT  
AND RESOURCES COUNCIL, INC.  
AS AMICUS CURIAE SUPPORTING RESPONDENT**

### INTEREST OF THE AMICUS CURIAE

The Nuclear Management and Resources Council, Inc. ("NUMARC"), is the organization of the nuclear power industry that is responsible for coordinating the combined efforts of all utilities licensed by the United States Nuclear Regulatory Commission ("NRC" or "Commission") to construct or operate nuclear power plants, and of other nuclear industry organizations, in all matters involving generic operational and technical issues affecting the industry. Every electric utility responsible for constructing or operating a commercial nuclear power plant in the United States is a member of NUMARC. In addition, NUMARC's members include major architect-engineering firms and all of the major nuclear

steam supply system vendors, including respondent General Electric Company.

Every member represented by NUMARC that is engaged in NRC-licensed activities is subject to the strictures of the nuclear regulatory scheme created by the Atomic Energy Act of 1954, as amended, including Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851 ("Section 210"), and to the regulatory oversight of the NRC (formerly the Atomic Energy Commission). NUMARC has an abiding interest in ensuring that the congressionally crafted regulatory scheme governing its members' operations is construed and applied in a manner consistent with the congressional goal of ensuring that nuclear facilities are constructed and operated in such a manner as to protect the health and safety of the public.

NUMARC believes that petitioner's claims are preempted by federal law and were thus correctly dismissed by the courts below. Further, it is NUMARC's view that the national objectives established by Congress in the Atomic Energy Act and administered by the NRC, including emphasis on early identification and remediation of potential nuclear safety problems at nuclear facilities, would be substantially impeded if employers in the industry were also subject to the vicissitudes of varying state law conceptions of what does, and does not, advance those policies.<sup>1</sup>

#### STATEMENT OF THE CASE

NUMARC adopts the Statement of the Case set forth in respondent General Electric Co.'s ("GE") brief. Nevertheless, we respectfully invite the Court's attention to the following record facts.

<sup>1</sup> Pursuant to Rule 37 of the Rules of this Court, NUMARC has filed with the Clerk the parties' written consent to the submission of this Brief.

Having first sought remedies for alleged maltreatment at the hands of her employer before the Department of Labor under Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851 (Pet. App. 30a-56a), and before the NRC under 10 C.F.R. § 2.206 (Pet. App. 57a-58a), petitioner Vera M. English brought this diversity action in district court in 1987. Claiming that she had been wrongfully terminated and that respondent had intentionally caused her emotional distress, petitioner sought compensatory damages of "at least" some \$1.3 million (J.A. 21) and punitive damages of approximately \$2.3 billion (Pet. App. 6a). Specifically with regard to her emotional distress claim, petitioner alleged that "GE intentionally inflicted emotional distress on [her] as 'punishment' for her reporting violations to the NRC and to make an example of her." J.A. 20. She also alleged that her employer's actions constituted "extreme and outrageous conduct." *Id.* The district court summarized the particular conduct on which petitioner's claims had been based as follows:

With respect to "extreme and outrageous" conduct plaintiff alleges that GE's management (1) removed her from her job in the Chemet Lab under guard as if she were a criminal, exposing her to contempt and ridicule; (2) assigned her to a degrading "make work" job; (3) derided her as paranoid; (4) barred her from employment in controlled areas; (5) subjected her to constant surveillance in the workplace; (6) isolated her from fellow workers and did not even permit her to eat in the company lunchroom with her fellow workers; and (7) conspired to fraudulently charge her with violations of safety and criminal statutes.

Pet. App. 27a.

The district court held that petitioner's claims fell squarely within the scope of Section 210, which constituted her exclusive remedy. Petitioner appealed the ruling on her emotional distress claim, and the Fourth Cir-



cuit agreed with the lower court that Section 210 preempted that claim. Petitioner obtained a writ of certiorari from this Court.

## SUMMARY OF ARGUMENT

### I.

In the federal legislation governing the nuclear industry enacted over the past four decades, Congress has completely occupied the field of nuclear safety regulation. Only rarely has it provided for a role by the states, and then only in narrowly limited circumstances. Section 210 was enacted as a part of the intricate and comprehensive federal scheme for ensuring the safe construction and operation of nuclear facilities. Its employee protection features are a means to that end, not an end in themselves. Section 210 therefore must be read *in pari materia* with the statutory scheme already in place when it was enacted. Such a reading compels the conclusion that, if Congress had intended to permit the states to provide an alternative and duplicative system of remedies for retaliation claims that fall within the ambit of Section 210, it surely would have said so.

This Court's decisions in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983), and *Silkwood v. Ker-McGee Corp.*, 464 U.S. 238 (1984), recognize the complete occupation of this field by Congress. Those decisions also affirm that, absent an express provision authorizing the states to act in this area or clear and abundant evidence of a congressional intent to permit them to do so, state law is precluded from any role. Neither of these factors exists with respect to claims, such as petitioner's, that are cognizable under Section 210. There thus is no basis for finding that petitioner's claims are within any of the limited exceptions to the broad preemptive sweep of federal nuclear energy law.

### II.

Even had Congress not occupied the field of nuclear safety regulation, petitioner's claims would be preempted for a further reason: application of state law to facts such as those alleged in her complaint would interfere with full realization of the purposes embodied in the federal regulatory scheme. The much longer statute of limitations applicable to petitioner's state law claim subverts the provisions in federal law calculated to ensure that information about potential nuclear safety issues comes to the attention of federal authorities in timely fashion. Further, state law apparently would permit awards of punitive damages irrespective of an NRC decision to impose, or not to impose, civil penalties provided for in the federal regulatory scheme. And state law contains no provision comparable to Section 210(g), which would preclude those who violate federal nuclear safety requirements from obtaining a remedy. These differences inevitably give rise to the potential for state law interference with the fulfillment of federal objectives.

### III.

The decisions below are also entirely consistent with this Court's preemption decisions under the Labor Management Relations Act, 29 U.S.C. §§ 141-187 ("LMRA"). The Court has held that state laws regulating conduct arguably prohibited by the LMRA are preempted because Congress has committed the resolution of such matters to the National Labor Relations Board ("NLRB"), just as Congress has designated the Secretary of Labor and the NRC as the federal agencies with authority to address retaliation claims brought by nuclear industry employees.

Cases cited by petitioner in which the LMRA has been held not to preempt state claims have been grounded in the fact that the NLRB is generally powerless to provide any remedy for personal injuries of the sort that state law may address. Section 210, on the other hand, supplies a remedy for retaliation claims such as petitioner's.

Because petitioner's claim here is essentially the same claim that she litigated before the Secretary of Labor under Section 210, it clearly does not involve a collateral matter only peripherally related to the subjects of interest in Section 210 proceedings. Furthermore, federal occupation of the field of nuclear safety regulation leaves no room for a balancing of competing state and federal interests in the issues raised in the petitioner's complaint.

### ARGUMENT

#### I. CONGRESS INTENDED SECTION 210 OF THE ENERGY REORGANIZATION ACT TO BE THE EXCLUSIVE REMEDY FOR EMPLOYEES IN THE NUCLEAR INDUSTRY WHO CLAIM THAT THEY HAVE BEEN DISCRIMINATED AGAINST FOR RAISING NUCLEAR SAFETY CONCERNS.

##### A. Section 210 Must Be Read *In Pari Materia* With Other Provisions Of The Comprehensive Federal Regulatory Regime Governing The Nuclear Industry, And When So Read It Provides An Exclusive Federal Remedy For Allegedly Retaliatory Acts Motivated By An Employee's Raising Nuclear Safety Concerns.

In 1978, Congress amended the Energy Reorganization Act of 1974 by adding a new Section 210, Pub. L. No. 95-601, 92 Stat. 2951 (1978), 42 U.S.C. § 5851. This provision, applicable only to the nuclear industry, provides specific administrative procedures and full compensatory remedies to employees of NRC licensees and their contractors who allege that they have been discriminated against for engaging in any "action to carry out the purposes" of the Energy Reorganization Act or the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.*

Far from legislating in a regulatory vacuum, as petitioner implies was the case, Congress added this new safety provision—Section 210—to what is likely the most comprehensive federal regulatory scheme ever enacted. From the beginning, that scheme completely excluded state regulation and subsequently has permitted limited

regulation by the states only by express decree. When placed in its proper context, there is ample evidence that Congress intended Section 210 to be the exclusive remedy for employees in the nuclear industry who allege that they have been retaliated against for raising radiological safety concerns.

This Court has recounted the history of the regulation of the nuclear industry before. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206-12 (1983). In brief, Congress' first legislation in this area created a federal government monopoly over the production and use of fissionable material. Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1946). In the Atomic Energy Act of 1954, Congress implemented its determination that the private sector should participate in the development of atomic energy for power production purposes, but only under the exclusive regulatory oversight of a federal agency. The 1954 Act thus created the Atomic Energy Commission ("AEC"), which was charged with the licensing of private construction, ownership, and operation of commercial power reactors and which retained exclusive jurisdiction to license the acquisition, transfer, possession, and use of nuclear materials. "Upon these subjects, no role was left for the States." *Pacific Gas & Electric Co.*, 461 U.S. at 207.

When Congress permitted states to regulate at all in this area, it did so expressly. Congress even found it necessary to provide expressly that the 1954 Act reserved to the states their traditional power to regulate the "generation, sale, or transmission of electric power produced through the use of nuclear facilities . . . ." Section 271, 42 U.S.C. § 2018. As the Court indicated in *Pacific Gas & Electric Co.*, there are very few instances in the statutes governing the nuclear industry in which Congress has relinquished power to the states.

In 1959, Congress added another such provision, Section 274, 42 U.S.C. § 2021. The 1959 amendment granted



the AEC the authority "by agreements with state governors to discontinue [the Commission's] regulatory authority over certain nuclear materials under limited conditions." *Pacific Gas & Electric Co.*, 461 U.S. at 209. Under such agreements, the NRC cedes its authority to "Agreement States," and consequently there is no "dual regulation" in such states. Thus, the 1959 amendment permitted state regulation of nuclear materials to a very limited extent and only where the state has entered into an explicit agreement with the federal government and restricted amounts of nuclear materials are involved. In the 1959 amendment Congress again included an express provision to make clear its intent with respect to the effect of Section 274 on pre-existing AEC and state regulatory authority.<sup>2</sup> Section 274(b)(4) and (c) make clear that the AEC retained its authority over large quantities of special nuclear material and with respect to the construction and operation of any production or utilization facility. 42 U.S.C. § 2021(b)(4), (c).<sup>3</sup>

<sup>2</sup> In Section 274(k), 42 U.S.C. § 2021(k), Congress declared that Section 274's narrowly circumscribed provisions for the exercise of state authority should not be construed as implying any further restrictions on the states. Petitioner suggests that Section 274(k) creates an exemption from the generally preemptive effect of the Atomic Energy Act for all forms of state regulation of nuclear facilities for economic and other nonsafety purposes. Pet. Br. at 21-22. But this contention ignores this Court's pronouncement in *Pacific Gas & Electric Co.* that "Section 274(k), by itself, limits only the pre-emptive effect of 'this section,' that is, § 274, and does not represent an affirmative grant of power to the States." 461 U.S. at 210 (emphasis added).

<sup>3</sup> Petitioner was employed at a GE fuel fabrication plant licensed by the NRC to possess and use special nuclear material pursuant to Section 53 of the Act (42 U.S.C. § 2073) and 10 C.F.R. Part 70 of NRC regulations. Because GE is authorized to possess large quantities of special nuclear material at the plant, much more than that contemplated in Section 274(b)(4) of the Act (42 U.S.C. § 2021(b)(4)), such a plant is subject only to NRC regulation, not "Agreement State" regulation. Thus, for purposes of preemption analysis, the GE plant is akin to the utilization facilities (i.e., nuclear reactors) that are similarly subject only to NRC regulation

In the Energy Reorganization Act of 1974, Congress restructured federal control over the nuclear industry. The Act abolished the AEC and assigned its licensing and regulatory functions to the NRC. The 1974 Act did not alter in any way the role the states were to play in the regulation of nuclear power. Finally, in 1978, Congress amended the Energy Reorganization Act by adding Section 210. Again, the new legislation provided no new authority to the states. On the contrary, the legislative history of Section 210 establishes that Congress intended the provision as an addition to legislation governing nuclear safety, and one that was to be meshed with the existing body of law.

Finally, while new section 210 of the Energy Reorganization Act of 1978 provides the Department of Labor with new authority to investigate an alleged act of discrimination in this context and to afford a remedy should the allegation prove true, it is not intended to in any way abridge the [Nuclear Regulatory] Commission's current authority to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty, license suspension or license revocation. Further, the pendency of a proceeding before the Department of Labor pursuant to new section 210 need not delay any action by the Commission to carry out the purposes of the Atomic Energy Act of 1954.

124 Cong. Rec. 29771 (1978) (statement of Sen. Hart).

In similar circumstances, this Court has consistently held that amending legislation such as Section 210 must be read *in pari materia* with the previously enacted legislative scheme of which it is made a part.<sup>4</sup> This rule, the

(Section 274(c)(1) of the Act, 42 U.S.C. § 2021(c)(1)) and that are referred to in such cases as *Pacific Gas and Electric Co.*

<sup>4</sup> See *Haig v. Agee*, 453 U.S. 280, 300-01 (1981) (statute enacted 52 years after passage of the Passport Act and making it unlawful to travel abroad without a passport even in peacetime must be read *in pari materia* with the Passport Act); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (Fed. R. Civ. P. 54(d)



Court has explained, "is but a logical extension of the principle that individual sections of a single statute should be construed together, for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject." *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (citation and footnote omitted).

Prior to the passage of Section 210 in 1978, it was generally recognized that Congress had preempted state regulation of matters subject to the federal regulatory scheme. In the leading preemption case of that time, *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972), the Eighth Circuit had held that Congress had preempted the state's attempt to regulate radioactive waste releases from nuclear power plants, even though Congress had said nothing about the states' role in this area and even though compliance with both the federal and state standards was possible. The circuit court found that the 1959 amendment to the Atomic Energy Act itself evidenced a congressional intent to exclude state regulation of the operation of nuclear power facilities, except to the extent that a state had entered into a cooperative agreement with the federal government to regulate certain nuclear materials.

[T]he federal government has exclusive authority under the doctrine of pre-emption to regulate the construction and operation of nuclear power plants, which necessarily includes regulation of the levels of radioactive effluents discharged from the plant.

*Id.* at 1154.<sup>5</sup>

must be read *in pari materia* with previously enacted limitations on the power of courts to tax litigants with the costs of litigation in 28 U.S.C. §§ 1821, 1920).

<sup>5</sup> See also *State of N.J., Department of Env'tl. Protection v. Jersey Cent. Power & Light Co.*, 60 N.J. 102, 351 A.2d 337 (1976) (state regulation of cessation of nuclear power plant's func-

Because Congress must necessarily have been aware of the body of nuclear energy law already in existence at the time of Section 210's enactment in 1978, it was surely cognizant of the structure and underlying policies of the Atomic Energy Act onto which Section 210 was engrafted, of the fact that only very narrowly circumscribed powers had been left to the states, and of the necessity for express provision for state authority in any area in which it was intended that the states be left free to act. When Section 210 is considered in its proper context, there can be no doubt as to its preemptive effect over claims such as petitioner's here.

Moreover, in the case of Section 210, it is not necessary to rely only upon the usual presumption that Congress was aware of the historical practice of making specific provision for any exceptions in the preemptive sweep of federal law governing the nuclear industry. At the very same time that Congress was considering Section 210, it also had before it proposals to amend Section 274.<sup>6</sup> Thus, the Congress that enacted Section 210 was itself directly involved at the same time with amending one of the few provisions of the Atomic En-

tioning, emission of radioactive waste and dilution of that waste is impermissible because regulation of those matters has been vested in the AEC); *Commonwealth Edison Co. v. Pollution Control Bd.*, 5 Ill. App. 3d 800, 284 N.E.2d 342 (1972) (federal law preempts state environmental control statute to the extent it authorized state regulation of radiation from nuclear power plants).

<sup>6</sup> Indeed, when it passed the Senate, S. 2584, the bill that contained what was to become Section 210, also contained provisions (Sections 16-18 of the bill) to amend certain portions of Section 274 having to do with the exercise of state authority with regard to radiological by-product materials (uranium mill tailings). 124 Cong. Rec. 29785-87 (1978). These provisions were dropped from the conference bill, however, "in light of other legislation before the Congress to regulate mill tailings." H.R. Rep. No. 1796, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7304, 7311 (1978) (Conference Report). That other legislation was H.R. 13650, which passed the House and Senate on October 14, 1978. 124 Cong. Rec. 37545, 38230 (1978). Senate Bill 2584 also passed both houses on October 14, 1978. *Id.* at 38239, 37526 (1978).

ergy Act or the Energy Reorganization Act that expressly cedes limited authority to the states. Under these circumstances, it strains credulity to suggest that at the time of Section 210's passage there was an unstated congressional intention to cede authority to the states to provide alternative and duplicative remedies for conduct directly addressed by Section 210.

**B. This Court's Decisions In *Pacific Gas & Electric Co. And Silkwood v. Kerr-McGee Corp.* Compel The Conclusion That The States Have No Authority To Regulate Conduct Such As That Alleged In Petitioner's Complaint.**

This Court affirmed in *Pacific Gas & Electric Co.* that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." *Id.* at 212 (footnote omitted). In addition, the Court made it clear that any attempt by a state to regulate "the construction or operation of a nuclear powerplant," even if motivated solely by "nonsafety concerns," would be plainly impermissible because the exercise of such regulatory authority would "directly conflict with the [NRC's] exclusive authority" over such matters. *Id.* Moreover, in language that is particularly pertinent to resolving the issue in the present case, the *Pacific Gas & Electric Co.* decision emphasized the profoundly preemptive effect of federal occupation of this field.

When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of pre-emption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act."

*Id.* at 212-13 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947) (emphasis added)).

The language of petitioner's complaint in this case reveals that she has sought to bring a claim under state law that embraces matters squarely addressed by Section 210. The complaint's description of the "extreme and outrageous conduct" alleged asserts that such

conduct was "motivated by GE's desire to punish her for raising safety concerns" (J.A. 16, 20), that her employer was motivated by a desire to demonstrate that it would "severely punish employees who insisted on compliance with safety regulations and reported GE violations to the NRC as required by law" (J.A. 16), and that the treatment to which she allegedly had been subjected had all occurred "because she had exposed and threatened to continue to expose as sham, management's pretended concern with employee and public health and safety" at the facility where she had been employed (J.A. 16-17).

At bottom, then, her cause of action for intentional infliction of emotional distress consists of nothing more or less than claims that her employer retaliated against her because of her involvement in raising nuclear safety concerns, precisely the sort of conduct that Section 210 was intended to regulate. Thus, "the matter on which the State asserts the right to act," *Pacific Gas & Electric Co.*, 461 U.S. at 213—here the action of a nuclear industry employer in allegedly retaliating against one of its employees for raising concerns about nuclear safety—is directly the subject of federal regulation. Inasmuch as this is not one of the strictly circumscribed areas in which Congress has expressly preserved the traditional regulatory authority of the states, the application of North Carolina law to the facts alleged by petitioner is perforce preempted.

The Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), reinforces the conclusion that petitioner's claim is preempted because it intrudes upon a field fully occupied by the federal government. The majority in that case held that state tort law remedies for personal injuries resulting from physical exposure to radiation are not preempted by federal law. In so holding, the Court also made clear that it was recognizing only a limited exception to the general rule enunciated in *Pacific Gas & Electric Co.* that all matters



concerning nuclear safety and the operation of nuclear facilities are the exclusive province of the federal regulatory regime.

The majority in *Silkwood* first noted that the decision of Congress to prohibit the states from intruding on the safety aspects of nuclear development had derived from a belief that the NRC was more qualified than the states to determine the appropriate safety standards to be employed at nuclear facilities. 464 U.S. at 250.

If there were nothing more, this concern over the States' inability to formulate effective standards and the foreclosure of the States from conditioning the operation of nuclear plants on compliance with state-imposed safety standards arguably would disallow resort to state-law remedies by those suffering injuries from radiation in a nuclear plant. There is, however, ample evidence that Congress had no intention of forbidding the States to provide such remedies.

*Id.* at 250-51.

The evidence to which the majority opinion referred consisted of two critical facts. First, Congress had provided no federal remedy for the victims of such injuries. *Id.* Second, and "[m]ore importantly, the only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available." *Id.*<sup>7</sup>

But neither of these factors is present in cases involving the application of state law to alleged acts of retaliation for raising nuclear safety concerns. In Section 210, Congress has provided an explicit and detailed federal administrative remedy for those who suffer retaliation under circumstances such as those alleged by petitioner here.

<sup>7</sup> The Court also noted that in congressional deliberations on the 1966 amendments to the Price-Anderson Act, a provision that would have created a federal tort to replace existing state remedies had been expressly considered and rejected. *Id.* at 254-55.

Moreover, neither petitioner nor her supporting *amici* have pointed the Court to any evidence that Congress has at any time assumed that state tort remedies would be available in cases in which retaliation for raising nuclear safety concerns is alleged. Quite simply, there is no indication whatsoever in the legislative history of Section 210 or any of the other provisions of the Atomic Energy Act or the Energy Reorganization Act suggesting that Congress even considered, let alone chose to tolerate, the availability of state remedies in such cases.

The majority opinion in *Silkwood* frankly acknowledged that "there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability." *Id.* at 256. The Court also made clear that tolerance of that tension was possible only because the evidence of a congressional intent to allow it to exist was abundant, but then emphasized that applicability of its ruling to claims in other areas was not to be presumed:

We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law. But *insofar as damages for radiation injuries are concerned*, pre-emption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

*Id.* (emphasis added). Absent the compelling evidence of congressional intent that supplied the foundation for the narrow exception recognized by the majority in *Silkwood* for radiation injury claims, the fact that Congress has completely occupied the field of nuclear safety compels the conclusion that state law remedies are preempted.



Petitioner seeks to avoid this straightforward application of the *Pacific Gas & Electric Co.* and *Silkwood* decisions by asserting that the interests of the states in granting their citizens the right to litigate intentional infliction of emotional distress claims have "nothing whatsoever to do with nuclear energy or nuclear power." Pet. Br. at 14. But if that were the test, the entirety of the Court's discussion of congressional intent in *Silkwood* would have been nothing more than surplusage, for it can just as well be said that the personal injury law of the states was also not conceived with nuclear energy in mind.

Moreover, petitioner's argument misses one of the central points of the Court's decision in *Pacific Gas & Electric Co.*, which is that the purpose underlying state laws affecting nuclear facilities only becomes relevant if the state is acting pursuant to authority expressly reserved to it by federal law.<sup>8</sup> Before even reaching its analysis of the purpose of the state law at issue in that case, the Court was careful first to emphasize that any state regulation of the construction or operation of a nuclear power plant "even if enacted out of nonsafety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation." 461 U.S. at 212 (emphasis added).

Management of the workforce at a nuclear facility, including the exercise of the prerogatives to discipline and discharge employees, is indisputably a vital part of the operation of that facility. Especially where, as here, state law is sought to be applied to the exercise of management prerogatives in the context of a workplace dispute that is alleged to have at its core an issue of radiological safety, the suggestion that this would not constitute state regulation of the operation of a nuclear

<sup>8</sup> As is discussed *supra*, *Pacific Gas & Electric Co.* involved an extension of the traditional economic regulation of electric utilities, a sphere of state regulatory activity explicitly preserved by Section 271 of the Atomic Energy Act, 42 U.S.C. § 2018.

facility is simply untenable. Thus, whether thought was given in the conception of North Carolina emotional distress law to its effects on the operation of nuclear facilities has utterly no bearing on the fact that federal law preempts state intrusions in such matters, regardless of whether such conflicts with exclusive federal authority were intended by the authors of state law.

## II. PETITIONER'S CLAIMS ARE PREEMPTED FOR THE FURTHER REASON THAT THE APPLICATION OF STATE LAW TO HER ALLEGATIONS OF RETALIATION WOULD STAND AS AN OBSTACLE TO, AND FRUSTRATE, FULL REALIZATION OF THE OBJECTIVES OF FEDERAL LAW GOVERNING THE REGULATION OF NUCLEAR FACILITIES.

Even if Congress had not completely occupied the field of nuclear safety, petitioner's action here must be held to be preempted because the application of state law in the circumstances of her case would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Electric Co.*, 461 U.S. at 204 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Indeed, when state law "presents the 'prospect of interference with the federal regulatory power,' then the state law may be pre-empted even though 'collision between the state and federal regulation may not be an inevitable consequence.'" *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (quoting *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91-92 (1963)). And where an application of state law may frustrate the objectives of federal law, it is the effect rather than the purpose of the state law that controls the preemption analysis. *International Paper Co. v. Oulette*, 479 U.S. 481, 498-99 n.19 (1987); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

Permitting state court actions such as petitioner's would frustrate the intent of Congress to ensure expe-

ditious processing of Section 210 claims. While the statute of limitations in Section 210 is 30 days, 42 U.S.C. § 5851(b)(1), the limitations period applicable to petitioner's infliction of emotional distress claim under North Carolina law is apparently three years. Pet. App. 22a. Where Section 210 mandates that the Secretary of Labor issue her decision within 90 days in the administrative process embraced by Congress, 42 U.S.C. § 5851(b)(2), it is common knowledge that litigation in the courts can take many years to conclude. The significance of these provisions calling for expeditious resolution of Section 210 claims is made more apparent when considered in conjunction with (a) the further requirement of Section 210(b)(1) that the Secretary of Labor notify the NRC upon receipt of a Section 210 complaint, and (b) the Memorandum of Understanding between the Department of Labor and the NRC in which they agree "to cooperate with each other to the fullest extent possible" in the investigation of Section 210 matters. 47 Fed. Reg. 54585 (1982).

Because radiological safety may be implicated in any Section 210 complaint, it is vital and in the public interest that the NRC be apprised at the earliest possible time of the allegations of an employee who claims to be the victim of retaliation for raising nuclear safety concerns. Such allegations of wrongdoing are important to the NRC for two reasons. First, they may involve issues of nuclear hardware or procedures that bear directly and immediately on safe operations. Second, they may also involve the qualifications (in terms of management ability and attitudes) of licensees to possess and use nuclear materials. This information must be timely received by the NRC to permit it to respond rapidly to such issues and to any "chilling effects" on the identification of safety concerns that cases of retaliation may cause among the workforce in general. See *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1509 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986) ("[I]ntertwined with an employment discrimination complaint

could be matters specifically concerning substantive questions of nuclear safety which are better determined by the NRC, a body with competence on nuclear issues.").

The NRC, acting pursuant to its authority under Section 161 of the Atomic Energy Act, 42 U.S.C. § 2201, see 47 Fed. Reg. 30452 (1982), has promulgated regulations that are the correlative of Section 210. *E.g.*, 10 C.F.R. § 70.7 (1989).<sup>10</sup> Where the NRC determines that this regulatory provision has been violated, it may take action to (a) suspend, modify or terminate the licensee's license; (b) impose a civil penalty; or (c) initiate "[o]ther enforcement action." *Id.*

This fundamental scheme for protecting public health and safety will be undermined if the decision of when and in what forum an action by an aggrieved party should be brought is left to the choice of that party. And this would be doubly true if plaintiffs could simply rename their retaliation claims, calling them infliction of emotional distress claims as petitioner has done here, and thereby avail themselves of the opportunity to ob-

<sup>9</sup> Indeed, the Tenth Circuit in *Brock* initially noted, in its review of an Order of the Secretary in a Section 210 proceeding, that it was "troubled by a jurisdictional question. . . . [T]he Secretary of Labor should not be involved with matters pertaining to nuclear safety, such matters more appropriately coming within the expertise of the NRC." *Id.* at 1508. The court concluded, however, that the Memorandum of Understanding entered into between the two agencies acted to "safeguard the rights of all parties involved in such an employment proceeding." *Id.* at 1509. The Tenth Circuit has subsequently ruled that states have no role to play in this context. *Masters v. Daniel Int'l Corp.*, 895 F.2d 1295 (10th Cir. 1990) (Section 210 preempts state law claim for retaliatory discharge).

<sup>10</sup> The proscriptive language of 10 C.F.R. § 70.7, and parallel provisions in §§ 30.7, 40.7, 50.7, 60.9, and 72.10, is essentially the same as that of Section 210. See also 10 C.F.R. § 19.20 ("Employment discrimination by a licensee or a contractor or subcontractor of a licensee against an employee for engaging in protected activities . . . is prohibited.").



tain millions of dollars (or \$2.3 billion, as petitioner has sought here) in punitive damages. In such circumstances there would be few who would retain any interest in having their disputes resolved through the administrative process that Congress went to the trouble to create.

This Court's opinions have consistently indicated that the creation of a detailed and comprehensive scheme of administrative remedies by Congress gives rise to a presumption that resort to alternative fora, which may offer procedural advantages and the possibility of more attractive remedies to those seeking relief, was not contemplated. See, e.g., *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375-76 (1979) (plaintiffs whose rights under Title VII of the Civil Rights Act of 1964 had been violated not allowed to seek remedies under 42 U.S.C. § 1985(3) because of factors such as the availability of longer statute of limitations, punitive damages and jury trial under the latter statute, and "[p]erhaps most importantly, the complaint could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress . . ."); *Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976) (balance, completeness and structural integrity of administrative procedure established in Title VII of Civil Rights Act of 1964 for processing claims of government employees held inconsistent with assertions that such remedies were designed only to supplement other judicial remedies).<sup>11</sup>

<sup>11</sup> See also *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1035 (5th Cir. 1984):

The fact that Congress has produced so many detailed provisions governing the nuclear industry indicates the legislature may well have attempted to approach the line where it believed the added costs of regulation exceed benefits. *Edgar v. MITE*, 457 U.S. 624 (1982) (holding that additional protection afforded investors by state securities statutes would "overprotect" investors to their detriment); see Easterbrook, *Statutes' Domain*, 50 U.Chi.L. Rev. 533, 542 (1983). If this is so, for a court to interpret the statute to authorize "more in the same

Moreover, it is especially doubtful that Congress intended to permit those claiming that they have been retaliated against for raising nuclear safety concerns to have access to punitive damages awards in state tort actions where such awards would only replicate mechanisms in the federal regulatory scheme designed to effect the same objective. "[D]eterrence of future egregious conduct is a primary purpose . . . of punitive damages." *Smith v. Wade*, 461 U.S. 30, 49 (1983). But in the case of conduct that would violate Section 210 and 10 C.F.R. § 70.7, the NRC already has the authority to impose civil penalties for deterrent purposes. Atomic Energy Act § 234, 42 U.S.C. § 2282.<sup>12</sup> Indeed, the NRC has already exercised that authority to impose a \$20,000 civil penalty against respondent for the very conduct at issue in the present proceedings. *In re General Electric Co.*, DD-89-1, 29 N.R.C. 325, 334 (1989) (based on findings of the Administrative Law Judge in petitioner's Section 210 proceeding). See Pet. App. 57a-58a.<sup>13</sup> As this Court has held, a conflict between federal and state law is imminent whenever both federal and state remedies are brought to bear on the same activity. *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (holding state law preempted that imposed sanctions on employers that repeatedly violated federal labor laws).

Finally, that Congress chose in Section 210(g) to deny a remedy under federal law to employees who themselves commit a violation of the Atomic Energy Act or the

vein" will result in regulation where costs exceed benefits, upsetting the balance intended by Congress.

<sup>12</sup> The regulatory provisions relating to NRC enforcement actions and the imposition of civil penalties in appropriate cases are found at 10 C.F.R. Part 2, App. C (1989).

<sup>13</sup> See also *In re Toledo Edison Co.*, EA 88-234 (Nov. 21, 1988) (imposing \$80,000 penalty for violation of 10 C.F.R. § 50.7, and ordering that license be modified to require notification of employee involvement in safety-related matters); *In re Tennessee Valley Auth.*, EA 86-093 (July 10, 1986) (imposing \$150,000 penalty for violations of § 50.7).



Energy Reorganization Act is likewise supportive of the conclusion that petitioner's claims in this case are preempted.<sup>14</sup> Whenever Congress erects a comprehensive federal scheme, combining action (such as providing a remedy for most employees subjected to retaliation for raising nuclear safety concerns) with inaction (such as denying remedies otherwise available to those who themselves violate the law), a "pre-emptive inference" may be drawn. *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

This inference cannot be dispelled by offering, as petitioner does (Pet. Br. 40 n.18), the facile suggestion that permitting employers to raise Section 210(g) as a defense to state infliction of emotional distress claims avoids any "actual conflict" between the two bodies of law. The critical question, quite simply, is not whether an "actual conflict" can be avoided, but whether the application of state law "presents the 'prospect of interference with the federal regulatory power.'" *Schneidewind*, 485 U.S. at 310. The existence of a possibility that an individual whose own illegal acts have eliminated her eligibility for a federal remedy might nevertheless obtain a remedy, including punitive damages, in a state infliction of emotional distress action would completely subvert the congressional judgment on how the balance should be struck in such situations. Moreover, even if employers would be in a position to assert a defense to a state law claim based on Section 210(g) (a matter that may well have to be determined under the law of the state in which the claim is brought), state courts and juries would inevitably have to become entangled in the administration of the Atomic Energy Act. For a state court or jury to rule on a Section 210

<sup>14</sup> Section 210(g), 42 U.S.C. § 5851(g), provides:

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended.

(g) defense, they would first have to determine whether the employee in fact "cause[d] a violation of any requirement of" the Energy Reorganization Act or the Atomic Energy Act—a question appropriately resolved only with the assistance of considerable technological expertise, and a question to which Congress intended that there be a uniform answer.

In sum, each of the three aspects of the federal statutory scheme cited by the district court (Pet. App. 19a-24a) in support of its conclusion that petitioner's claims were preempted demonstrates that the application of state law to such claims would inevitably interfere with the fulfillment of objectives embodied in federal law. In the absence of clear evidence of a congressional intent to tolerate such interference, claims such as petitioner's are necessarily preempted.

### III. THE DECISIONS OF THE COURTS BELOW ARE CONSISTENT WITH THE PREEMPTION PRINCIPLES ARTICULATED BY THIS COURT IN CASES ARISING UNDER THE LABOR MANAGEMENT RELATIONS ACT.

It is, of course, in the context of the history and comprehensive scope of federal nuclear safety regulation that petitioner's claim must be analyzed. Nonetheless, petitioner and supporting *amici* contend that the decisions of the courts below are not consonant with the principles articulated by this Court in federal labor law preemption cases. But as demonstrated below, the lower courts' rulings that petitioner's claim is preempted are in fact entirely consistent with those principles.

Shortly after Congress passed the National Labor Relations Act ("NLRA") in 1935, this Court ruled that the Act, while silent on the role states were to play, preempted state regulation of matters that Congress had entrusted to the jurisdiction of the NLRB. See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 190-91 (1978); *San Diego*

*Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).<sup>15</sup> In *Garmon*, the Court ruled that state laws regulating conduct arguably governed by Sections 7 or 8 of the Act, 29 U.S.C. §§ 157, 158, cannot stand because "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242. This strand of LMRA displacement of state law has been styled as "*Garmon* preemption."

The need to protect the "primary jurisdiction" of federal agencies charged by Congress to administer complex and interrelated federal schemes—the underpinning of *Garmon*—likewise dictates that petitioner's claim in this case has been preempted. Under the Atomic Energy Act and the Energy Reorganization Act, Congress has vested the NRC with the responsibility to regulate the conduct of its licensees. The Commission in fact long ago assumed the authority to investigate allegations of retaliation against employees who have attempted to pursue the safety goals of nuclear regulation by voicing nuclear safety concerns. *E.g.*, 10 C.F.R. § 19.16(c) ("No licensee shall discharge or in any manner discriminate against any worker because such worker has" voiced nuclear safety concerns.) (promulgated in 1973, 38 Fed. Reg. 22217, 22219 (1973), superseded in 1982 when 10 C.F.R. § 70.7 and its counterparts were first promulgated, 47 Fed. Reg. 30452 (1982)). And, as noted above, the Commission has imposed penalties on its licensees when allegations of discrimination have been substantiated, either through the Commission's own investigation or in Department of Labor proceedings.

In 1978, Congress extended to the Secretary of Labor the power to provide full compensatory remedies to ag-

<sup>15</sup> Congress amended the Act in 1947, Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-187 (1988). The Act will hereinafter be cited as the "LMRA."

grieved employees who comply with the procedures set forth in Section 210, but was careful not to curtail the pre-existing authority of the Commission in this field. 124 Cong. Rec. 29771 (1978). The Commission and the Secretary fulfill complementary and supportive roles in this scheme. See *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 637 (2d Cir. 1989) ("In a field as specialized and technical as that of nuclear energy, the importance of this interplay between the two agencies cannot be overemphasized.") (citing, *inter alia*, *Garmon* in holding that Section 210 is an exclusive remedy).

Where, as in *Garmon* and this case, Congress has created an intricate scheme that directs federal agencies to address and remedy a discrete type of dispute, no room remains for states to regulate in the same field. Thus, what has been said of *Garmon* also holds true here: "The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the" federal scheme, and even "supplemental" state laws may not apply. *Amalgamated Ass'n of Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971).

Here, petitioner's claim is in all material respects identical to that which she has already presented to the Secretary of Labor: that the respondent engaged in acts calculated to cause her emotional distress because she had raised nuclear safety concerns. Pet. App. 32a-40a; J.A. 7-20. In light of this "identity of issues," petitioner's reliance on *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), is misplaced. In an unfair labor practice proceeding, the NLRB would not be concerned with the emotional harm visited upon a charging party by conduct arguably subject to the LMRA. *Id.* at 304 ("Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of



the case.”).<sup>16</sup> In contrast, petitioner’s allegation that respondent intentionally caused her mental distress because she had voiced safety concerns was an issue actually litigated in her claim for compensatory relief before the Department of Labor. In sum, petitioner’s reliance on *Farmer* ignores the fact that the Department of Labor entertained a claim for redress of the very injury of which she complains, while the NLRB would not have done so.

Moreover, in each of the cases relied on by petitioner in which the Court has ruled that the LMRA does not preempt a state claim, the Court emphasized that the Board would have been powerless to provide a full remedy because in enacting the LMRA “Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.” *International Union, United Auto. Workers v. Russell*, 356 U.S. 634, 642-43 (1958).<sup>17</sup> In

<sup>16</sup> See also *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 63-64 (1966) (“The malicious publication of libelous statements does not in itself constitute an unfair labor practice. . . . The injury that the statement might cause to an individual’s reputation—whether he be an employer or union official—has no relevance to the Board’s function.”); *Belknap v. Hale*, 463 U.S. 491, 511 (1983) (“It is no less true here than it was in *Linn v. Plant Guard Workers* . . . that ‘[t]he injury’ remedied by the state law ‘has no relevance to the Board’s function.’”). Cf. *Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967) (The “public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board’s principal concern in fashioning unfair labor practice remedies.”).

<sup>17</sup> *International Ass’n of Machinists v. Gonzales*, 356 U.S. 617, 621 (1958) (“Although, if the unions’ conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering.”); *United Constr. Workers v. Laburnum Constr. Co.*, 347 U.S. 656, 663-65 (1954) (“Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. . . . The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with

contrast, Congress devised Section 210 expressly to provide full compensatory remedies to employees who have been discriminated against because they have engaged in action to carry out the purposes of federal nuclear legislation. Section 210(b)(2)(B) provides that, in addition to providing reinstatement and backpay, “the Secretary may order [the respondent] to provide compensatory damages to the complainant.” 42 U.S.C. § 5851(b)(2)(B). The statute unambiguously permits the Secretary to compensate the complainant for all losses sustained in connection with the alleged discrimination.<sup>18</sup> Indeed, petitioner had herself secured from the administrative law judge a judgment under Section 210 awarding \$70,000 as compensation for mental suffering and other damages before the Secretary ruled that her claim had not been timely filed. Pet. App. 55a.<sup>19</sup>

back pay.”); *Linn*, 383 U.S. at 63-64 (“The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.”); *Farmer*, 430 U.S. at 304 (“[T]he Board could not award Hill damages for pain, suffering, or medical expenses.”); *Belknap*, 463 U.S. at 511 (“‘The Board can award no damages, impose no penalty, or give any other relief’ to the plaintiffs in this case.”); see also *Lockridge*, 403 U.S. at 318 (White, J., dissenting) (noting that the Court’s decisions in *Russell*, *Laburnum*, and *Linn* were all based on the “inadequacy of the existing Board procedure to provide suitable remedies for those injured as a result of the conduct”).

<sup>18</sup> *DeFord v. Secretary of Labor*, 700 F.2d 281, 288 (6th Cir. 1983) (“Here, it is clear that Congress intended to allow ‘compensatory damages,’ and nothing less. The statute is not ambiguous on this point.”); *DeFord v. Tennessee Valley Auth.*, Case No. 81-ERA-1, slip op. at 4 (Secretary’s Order on Remand) (Apr. 30, 1984) (awarding \$10,000 to Section 210 complainant for “mental pain and suffering and damage to reputation”).

<sup>19</sup> Petitioner’s claim (Pet. Br. 31 n.12) that *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), “lays to rest,” fo. Garmon preemption purposes, the distinction this Court has drawn for forty years regarding claims for which the NLRB could provide a remedy and those for which it could not reveals a misunderstanding of the different strands of labor preemption. *Lingle*, a case addressing preemption by Section 301 of the LMRA, 29 U.S.C. § 185, expressly cautioned against such confusion, emphasizing that



*Garmon* notions of "primary jurisdiction" preemption, then, fortify the conclusion that federal laws regulating the nuclear industry preempt petitioner's claim because it seeks the application of state law to matters Congress has entrusted to the regulatory authority of federal agencies. Nevertheless, it is incorrect to conclude that the scope of *Garmon* preemption delimits the preemptive scope of nuclear regulatory legislation. Section 210, unlike the "prohibited conduct" provisions of the LMRA, was enacted in an area where Congress had already legislated comprehensively and where a federal agency already exercised dominion over the conduct for which Section 210 provides a remedy. Indeed, Section 210 regulates an industry over which the federal government originally held a monopoly and state regulation of which has always been narrowly circumscribed. If anything, the preemptive inferences to be drawn from the context of Section 210 are more compelling than those attending the LMRA.

The distinctions between preemption in the nuclear regulatory arena and under *Garmon* make petitioner's reliance on *Farmer* particularly inapt. By attempting to fit her claim within the "*Farmer* exception," petitioner erroneously assumes that the balancing of state and federal interests applicable in *Garmon* preemption can also be properly applied to nuclear regulatory preemption. As demonstrated above, because Congress has completely occupied the entire field of nuclear safety, no state law regulating in that field may apply. Simply put, federal occupation of the field leaves no room for a balancing of state and federal interests. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 n.9 (1985) ("The present tort suit would allow the State to provide a rule of decision where Congress has mandated that federal law should govern. In this situation the balancing of state and federal interests required by *Gar-*

---

*Garmon* preemption and § 301 preemption involve different inquiries. 486 U.S. at 409 n.8.

*mon* pre-emption is irrelevant, since Congress . . . has provided that federal law must prevail.").

For this reason, petitioner's claim is preempted regardless of whether it involves interests "deeply rooted in local feeling and responsibility," *Garmon*, 359 U.S. at 244, or laws of only passing interest. Moreover, petitioner cannot contend that her claim is of only "peripheral" concern to the federal scheme inasmuch as her claim, as demonstrated above, is among those that Congress has vested the Secretary with authority to address. *Norman*, 873 F.2d at 637 (distinguishing *Farmer* and holding that Section 210 is an exclusive remedy) ("We are not dealing here with a collateral matter that is only peripherally related to the safety concerns implicit in section 210 . . . . [T]he gravamen of the complaint herein is section 210 harassment.")<sup>20</sup> Moreover, because petitioner's claim presents precisely the same issue that the Secretary can address and remedy, and alleges conduct for which the NRC can impose an appro-

---

<sup>20</sup> *Farmer*, either as an "exception" to or defining the limits of the principles set out in *Garmon*, is unique to that type of preemption and cannot simply be applied as petitioner attempts to do in this case, to all other areas in which Congress has displaced state regulation. Indeed, a host of other federal laws have been held to preempt state law intentional infliction of emotional distress claims arising in the employment setting. *E.g.*, *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 645-46 (9th Cir. 1989) (*Farmer* not applicable to LMRA § 301 preemption; intentional infliction of emotional distress claim preempted); *Pane v. RCA Corp.* 868 F.2d 631, 635 (3d Cir. 1989) (ERISA preempts intentional infliction of emotional distress claim); *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 (5th Cir. 1988) (comprehensive scheme embodied in Longshoremen and Harbor Workers' Compensation Act preempts state law claim for intentional infliction of emotional distress); *Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1252-53 (5th Cir. 1986) (*Farmer* not applicable to Railway Labor Act preemption); *Lehman v. Morrissey*, 779 F.2d 526 (9th Cir. 1985) (per curiam) (remedial procedures created by Civil Service Reform Act preempt federal employee's claim for intentional infliction of emotional distress); *Binkley v. Loughran*, 714 F. Supp. 768, 771 (M.D.N.C. 1988) (LMRA § 301 preempts intentional infliction of emotional distress claim under North Carolina law).

priate penalty, the state's interest in compensating victims of socially intolerable conduct and society's interest in punishing a nuclear licensee for engaging in such conduct, are fully accomplished by the provisions of Section 210 and the Atomic Energy Act.

In sum, there is no merit to petitioner's contention that the Atomic Energy Act and the Energy Reorganization Act do not preempt her claim because the LMRA might not do so. In both the labor and nuclear arenas Congress has provided interrelated schemes of law, administrative procedures, and remedies; and state laws governing the same conduct regulated by the federal scheme are necessarily preempted. It does not follow, however, that an intentional infliction of emotional distress claim that would escape *Garmon* preemption also escapes Section 210 preemption, because the Secretary, unlike the NLRB, has been assigned to address such claims where, as here, they are premised upon retaliation for raising nuclear safety concerns. For these reasons, the decisions of the courts below are fully consistent with the principles of federal labor law preemption.

#### CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

NICHOLAS S. REYNOLDS \*

RICHARD K. WALKER

DONN C. MEINDERTSMA

BISHOP, COOK, PURCELL

& REYNOLDS

1400 L Street, N.W.

Washington, D.C. 20005-3502

(202) 371-5700

*Counsel for Amicus Curiae*

*Nuclear Management and*

*Resources Council, Inc.*

\* Counsel of Record